INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	2
State statutes, city charter provisions, city ordinances and state constitution, the validity of which is involved	2
Dates of Judgment and application for appeal	3
Nature of the case and rulings below	3
Appendix "A"—Opinion of Supreme Court of the State of Washington	24
Appendix "B"—Decision of Superior Court of Spokane County	34

Table of Cases Cited

Ajax v. *Gregory*, 177 Wash. 465; 32 Pac. (2) 560	22
Anderson National Bank v. *Luckett*, 321 U. S. 233; 88 Law Ed. 692	21
Angel v. *Bullington*, 330 U. S. 183; 91 Law Ed. 832	17
Brennen v. *Seattle*, 151 Wash. 665; 276 Pac. 886	22
Craig v. *Harney*, 331 U. S. 367; 91 Law Ed. 1546	16
Ex rel. McCollum v. *Board of Education*, 333 U. S. 203; 92 Law Ed. 648	16
Gottstein v. *Lister*, 88 Wash. 462; 153 Pac. 595	23
Great Northern Railway Co. v. *State*, 184 Wash. 648; 52 Pac. (2) 1274	22, 23
State ex rel. Potter v. *Maybury*, 161 Wash. 142; 296 Pac. 566	22, 23
Terminiello v. *Chicago*, 93 Law Ed. Ad. Op. 865	16
Treichler v. *State of Wisconsin*, 94 Law Ed. Ad. Op. 1, p. 21	16

Constitution, Statutes, City Charter and City Ordinances Cited

Constitution of the United States, 14th Amendment	17
United States Code:	
Title 28, Sec. 1257(2)	2

Page

Constitution of the State of Washington:
Article 11, Section 10 ..... 2, 3

WASHINGTON STATUTES

Remington's Revised Statutes:

Section 2472 ..... 2, 5, 15, 16
Section 2472-1 ..... 2, 6, 16
Section 2472-2 ..... 2, 6, 16
Section 8370-96 ..... 2, 7
Section 8370-100 ..... 2, 8, 16

CITY CHARTER PROVISIONS

Article IX, Section 83 ..... 2, 4
Article III, Section 12 ..... 2, 5
Article III, Section 13 ..... 2, 5
Article III, Section 10 ..... 2, 5

CITY ORDINANCES

Ordinance C 10078 ..... 9, 15
Ordinance C 9441 11
Ordinance A 1250 ..... 11, 13
Ordinance C 8178 ..... 11, 13, 14

POOR COPY

BLEED THROUGH

IN SUPREME COURT, STATE OF WASHINGTON

SEPTEMBER TERM, 1949

No. 608

GERALD MILLER AND DAVID CAUDILL, FOR THEMSELVES AND FOR THE BENEFIT OF OTHERS SIMILARLY SITUATED, *Respondents,*

vs.

THE CITY OF SPOKANE, A MUNICIPAL CORPORATION; WILLIAM P. PAYNE, COMMISSIONER OF PUBLIC SAFETY; E. W. PARSONS, CHIEF OF POLICE; WILLARD TAFT, KENNETH LAWSON, ARTHUR R. MEEHAN AND WALLACE N. SPROWL, CITY COMMISSIONERS, ALL PUBLIC OFFICIALS OF THE CITY OF SPOKANE, WASHINGTON, *Appellants*

JURISDICTIONAL STATEMENT UNDER AND PURSUANT TO RULE 12, PARAGRAPH 1, OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

(a) This is an appeal to the Supreme Court of the United States from a final judgment of the Supreme Court of the State of Washington, reversing a judgment of the Superior Court of Spokane County, Washington, directing the issuance of a permanent injunction against the defendants and appellants from arresting or molesting plaintiffs and others

similarly situated from having in their possession and operating pinball machines in the City of Spokane, Washington, and from seizing, confiscating and destroying such machines, and that such injunction shall remain in full force and effect until the electors of the City of Spokane shall have had an opportunity to exercise the right of referendum by a vote for or against the continued operation of pinball machines within the City of Spokane, Washington.

The City of Spokane, Washington appealed from the judgment of the lower court, and the State Supreme Court reversed the trial court's decision and upheld the validity of Remington's Revised Statute 2472, Laws of 1909, Section 220, page 955, defining gambling devices, and decreeing that pinball machines were gambling devices within the above statute. The federal statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section 1257 clause (2), Title 28 of the United States Code.

(b) The statutes of the State of Washington or the city ordinances and charter provisions of the City of Spokane, Washington, together with portions of the Constitution, the validity of which is involved, so far as pertinent to this appeal, are: Article 11, Section 10 of the Constitution of the State of Washington; Section 83, Article IX, page 6 of the Charter and General Ordinances of the City of Spokane; Sections 12 and 13, Article III, page 1 of the Charter and General Ordinances of the City of Spokane; Section 10, Article III, page 1 of the Charter and General Ordinances of the City of Spokane; Remington's Revised Statute, Sec. 2472; Remington's Revised Statute, Sec. 2472-1, Laws of 1937; Remington's Revised Statute, 2472-2, Laws of 1937; Remington's Revised Statute, Section 8370-96, Laws of 1941; Remington's Revised Statute 8370-100, Laws of 1941, more specifically hereinafter set out as follows:

POOR COPY

BLEED THROUGH

Article 11, Section 10 of the Constitution of the State of Washington, as set out in Volume 1 of Remington's Revised Statutes of Washington, Article 11, Section 10, pages 469, 470 and 471, which reads as follows:

"Sec. 10. INCORPORATION OF MUNICIPALITIES.—Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized and all charters thereof framed or adopted by authority of this constitution shall be subject to and controlled by general laws. Any city containing a population of twenty thousand inhabitants or more shall be permitted to frame a charter for its own government consistent with and subject to the constitution and laws of this state, and for such purpose the legislative authority of such city may cause an election to be had, at which election there shall be chosen by the qualified electors of said city fifteen freeholders thereof, who shall have been residents of said city for a period of at least two years preceding their election, and qualified electors, whose duty it shall be to convene within ten days after their election, and prepare and propose a charter for such city. Such proposed charter shall be submitted to the qualified electors of said city, and if a majority of such qualified electors voting thereon ratify the same, it shall become the charter of said city, and shall become the organic law thereof, and supersede any existing charter, including amendments thereto, and all special laws inconsistent with such charter. Said proposed charter shall be published in two daily newspapers published in said city for at least thirty days prior to the day of submitting the same to the

electors for their approval, as above provided. All elections in this section authorized shall only be had upon notice, which notice shall specify the object of calling such election, and shall be given for at least ten days before the day of election in all election districts of said city. Said elections may be general or special elections, and, except as herein provided, shall be governed by the law regulating and controlling general or special elections in said city. Such charter may be amended by proposals therefor submitted by the legislative authority of such city to the electors thereof at any general election, after notice of said submission published as above specified, and ratified by a majority of the qualified electors voting thereon. In submitting any such charter or amendment thereto, any alternate article or proposition may be presented for the choice of the voters, and may be voted on separately without prejudice to others."

Section 83, Article IX, page 6 of the Charter and General Ordinances of the City of Spokane, Washington, 1939 Edition, reads as follows:

"Section 83. Referendum: If, prior to the date when any ordinance shall take effect, a petition signed by qualified electors equal in number to ten per centum of the entire vote cast at the last preceding general municipal election, shall be filed with the clerk, protesting against the enactment of such ordinance, it shall be suspended from taking effect. Immediately upon the filing of the petition the clerk shall do all things required by section eighty-two (82) (b) of this article. Thereupon the council shall immediately reconsider such ordinance, and, if it do not entirely repeal the same, shall submit it to popular vote at the next municipal election; or, the council, in its discretion, may call a special election for that purpose; and such ordinance shall not take effect, unless a majority of the qualified electors voting thereon at such election shall vote in favor thereof."

POOR COPY

BLEED THROUGH

Sections 12 and 13, Article III, page 1 of the Charter and General Ordinances of the City of Spokane, Washington, 1939 Edition, read as follows:

> "Section 12. Form and Manner of Legislation: All legislation and appropriations of money shall be by ordinance, save where there is a special fund created for a particular purpose; payments from such fund shall be made on order of the council. Every ordinance and resolution shall be in writing and read in full at a council meeting before a vote is taken thereon, and upon every such vote the yeas and nays shall be called and recorded."
>
> "Section 13. Subject of Ordinance: The subject of every ordinance shall be set out clearly in the title thereof, and no ordinance except one making appropriations shall contain more than one subject. Ordinances making appropriations shall be confined to the subject of appropriations."

Section 10, Article III, page 1 of the Charter and General Ordinances of the City of Spokane, Washington, 1939 Edition, reads as follows:

> "Section 10. Meetings: All meetings of the council shall be public. It shall keep a journal of its proceedings, which shall be a public record. The council shall hold at least one legislative meeting each week, and shall hold meetings daily for the transaction of business.
>
> "At any meeting of the council three members shall constitute a quorum, but a less number may adjourn from time to time.
>
> "The council shall provide by ordinance a means by which a minority may compel the attendance of absent members."

Volume 4 of Remington's Revised Statutes of Washington, Section 2472, page 461, reads as follows:

> "Sec. 2472. Possession of Gambling Devices: Every person who shall have in his possession or shall permit

to be placed or kept in any building or boat, or part thereof, owned, leased or occupied by him, any table, slot machine, or any other article, device or apparatus of a kind commonly used for gambling, or operated for the losing or winning of any money or property, or any representative of either, upon any chance or uncertain or contingent event, shall be guilty of a gross misdemeanor. (L. '09, p. 955, Sec. 220.)"

Section 2472-1 of Remington's Revised Statutes, Laws of 1937, Chapter 119, Section 1, page 468 (Volume 4 of Remington's Revised Statutes, page 47 of the 1940 Supplement) reads as follows:

"Sec. 2472-1. Slot machines in places for sale of liquor. Every person who shall bring into this state, buy, sell, lease, deal in, have in his possession, acquire for the use in or keep in any building or boat or part thereof owned, leased, or occupied by him as a public place as defined in section 3, chapter 62, Laws of 1933, Extraordinary Session, as amended by Section 1, chapter 158 of the Session Laws of 1935 (Rem. Rev. Stat., section 7306-3), as distinguished from "club" as defined therein, any slot machine of a kind commonly used for gambling, into which may be or might have been inserted any piece of money or other object and from which as a result of such insertion and the application of physical or mechanical force may issue or might have issued wholly upon any chance or uncertain or contingent event, any piece or pieces of money, or any check or memorandum calling for any money or property, or which check or memorandum is, after issuance, actually redeemed in money or exchanged for property by any person whatsoever, or who shall aid or solicit any other person to do the same, shall be guilty of a felony. (L. '37, ch. 119, Sec. 1, p. 468.)"

Section 2472-2 of Remington's Revised Statutes, Laws of 1937, Chapter 119, Section 2, page 469 (Volume 4, Remington's Revised Statutes, pages 47 & 48 of the 1940 Supplement) reads as follows:

POOR COPY

BLEED THROUGH

"Sec. 2472-2. Slot machines in clubs. It shall be unlawful for any club to own or operate any slot machine as hereinbefore described, unless it shall have filed with the office of the Washington State Patrol and the office of the sheriff in the county in which such club is situated a brief description of the type of machine, the name of the person or firm by whom the same was manufactured, the name and address of the person, firm, or corporation in whom the ownership or title to such machine is vested, and the serial number, if any, the purpose of the description being to identify the particular machine so owned or operated and the ownership thereof. (L. '37, ch. 119, Sec. 2, p. 469.)"

Section 8370-96 of the Laws of 1941, Chapter 118, Sec. 1, at p. 388 of the 1941 Supplement of Remington's Revised Statutes of the State of Washington, effective March 21, 1941, reads as follows:

"Sec. 8370-96. Levy and collection of tax—Illegal activities—Computation of tax. From and after the first day of May, 1941, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business as an operator of certain mechanical devices irrespective of whether such activity shall be legal or illegal under the laws of this state or any subdivision thereof: Provided, however, Nothing in this act shall be construed to legalize any activity now or hereafter declared to be in violation of the laws of this state or any subdivision thereof, but the illegality of any such activity shall not be a defense or bar to the collection of any tax imposed thereon by this act. Such tax shall be measured by the application of rates against the gross operating income of the business as follows:

(a) Upon every person engaging within this state in business as an operator of any pinball machine, iron claw machine, travelling crane or other similar mechanical device wherein the element of skill or a combination of the elements of chance and skill is involved

in determining a pay-out to the player, as to such persons the amount of tax on such business shall be equal to the gross operating income of the business multiplied by the rate of ten per cent;

(b) Upon every person engaging within this state in business as an operator of any mechanical device wherein only the element of chance determines a pay-out to the player, as to such persons the amount of tax on such business shall be equal to the gross operating income of the business multiplied by the rate of twenty per cent. (L. '41, ch. 118, Sec. 1, effective March 21, '41.)"

Section 8370-100, Laws of 1941, Chapter 118, Sec. 1, at p. 390 of the 1941 Supplement of Remington's Revised Statutes of the State of Washington, effective March 21, 1941, reads as follows:

"Sec. 8370-100. Tax additional to other taxes—Exception. Gross operating income taxable under the provisions of this title shall not be taxable under the provisions of Title II of this act (Sec. 8370-4 et seq.), but the tax imposed by this title shall be in addition to any other tax to which the taxpayer may be subject under the laws of this state or any subdivision thereof. The state does not by this title preempt the field of imposing taxes or license fees with respect to mechanical devices hereby taxed, and this title shall not be construed to bar counties and incorporated cities or towns from regulating or prohibiting the operation of any such mechanical devices. (L. '41, ch. 118, Sec. 1, effective March 21, '41.)"

(c) The date of the judgment of the Supreme Court of the State of Washington sought to be reviewed is December 15, 1949, and the date upon which the application for appeal was presented is 7 day of January, 1950.

The plaintiffs and respondents were owners and operators of pinball machines within the City of Spokane, Washington, and on March 28, 1949 the City Council passed an ordi-

POOR COPY

BLEED THROUGH

nance, C 10078, prohibiting the possession and operation of pinball machines, and repealing previous ordinances which authorized the operation and possession of pinball machines; and licensing, taxing, regulating and providing for the conduct, inspection and operation of the machines. (R. 83-84.)

Prior to the effective date of Ordinance No. C 10078, a referendum petition satisfying the charter requirements was duly and regularly filed and a proper certification was affixed by the City Clerk, whereupon on May 13, 1949, the City Commissioners and Council reconsidered Ordinance No. C 10078 in order that said ordinance be submitted to a popular vote at the next municipal election (R. 83-84). At the same date of the order referring the passage of the ordinance in question to a popular vote at the next municipal election, the City Council, by resolution, notified the owners of the pinball machines that all persons having machines in their possession after May 23, 1949 would be arrested (R. 84).

Plaintiffs immediately sought the aid of the courts of equity in the Superior Court of the State of Washington in and for the County of Spokane, and sought and obtained an injunction against the defendants, prohibiting them from arresting the plaintiffs and others similarly situated, and further enjoining the defendants from interferring with the operation of the machines or from their confiscation (R. 83).

Ordinance No. C 10078 reads as follows:

"Ordinance No. C 10078

An ordinance prohibiting the possession, maintenance, conduct, operation or use of pinball machines or other devices of like character for rewards, excepting slot machines in private clubs, wherein there enters an element of chance; providing penalties for the violation thereof; and repealing Ordinance No. C9441, passed the City Council December 29, 1947.

The City of Spokane does ordain:

Section 1. Any person, firm or corporation who shall have in his or its possession or who shall conduct, maintain, operate or use, either as owner or owners, proprietor or proprietors, lessee or lessees, employee or employees, agent or agents, any pinball machine or any other automatic or mechanical device of like character, other than slot machines in private clubs as provided by Ordinance No. C 10077, wherein there enters an element of chance, whether the same be played or operated for money, checks, credits or any other thing or representative of value, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine in any sum not exceeding Three Hundred Dollars ($300) or by imprisonment in the city jail for a period not exceeding ninety (90) days, or by both such fine and imprisonment.

Section 2. That Ordinance No. C 9441, passed the City Council December 29, 1947, and entitled, 'An ordinance relating to public morality and good order in the City of Spokane, prohibiting the playing of pinball machines and devices of like character by persons under the age of twenty-one years, requiring the approval of premises where such machines are located, providing penalties for the violation thereof, and repealing Ordinance No. A1250, passed the City Council November 11, 1902, and Ordinance No. C8178, passed the City Council April 23, 1945' be, and the same is hereby repealed.

Section 3. This ordinance shall take effect and be in force thirty (30) days from and after its passage.

Passed the City Council March 28, 1949.

ARTHUR R. MEEHAN,
Mayor.

Attest:

ALEX BROWN,
City Clerk.

Approved as to form:

——— ——— ———,
Corporation Counsel."

POOR COPY

BLEED THROUGH

and it is upon this Ordinance that the referendum became effective. This Ordinance sought to repeal Ordinances C9441, Ordinance No. A1250 and Ordinance No. C8178. These ordinances read respectively as follows:

"Ordinance No. C9441 (By Payne)

An ordinance relating to public morality and good order in the City of Spokane, prohibiting the playing of pinball machines and devices of like character by persons under the age of twenty-one years, requiring the approval of premises where such machines are located, providing penalties for the violation thereof, and repealing Ordinance No. A1250, passed the city council November 11, 1902, and Ordinance No. C8178 passed the city council April 23, 1945.

The City of Spokane does ordain:

Section 1. It shall be unlawful for any person, firm or corporation who conducts, maintains, or operates, either as owner or owners, proprietor or proprietors, lessee or lessees, employee or employees, agent or agents, any pinball machine or any other automatic or mechanical device of like character which may be played or operated for money, checks, credits, rewards or any other thing or representative of value to permit or allow any person under the age of twenty-one years to play or operate the same.

Section 2. It shall be unlawful for any person under the age of twenty-one years to play or operate any pinball machine or any other automatic or mechanical device of like character which may be played or operated for money, checks, credits, rewards or any other thing or representative of value.

Section 3. It shall be unlawful for any person, firm or corporation to place any pinball machine or any other device of like character in any premises, the location of which has not been first approved by the commissioner of public safety.

Section 4. The commissioner of public safety shall make such rules and regulations as may be necessary to carry into effect the provisions of this ordinance and for its proper operation, which rules and regulations shall be filed with the city clerk and when so filed shall have the force and effect of law.

Section 5. The commissioner of public safety may suspend or revoke any location approval at any time when in his opinion the further operation of pinball machines or other devices of like character in operation at a particular location would be detrimental to the public peace or morals, or for the violation of any of the provisions of this ordinance or of any rule or regulation promulgated thereunder. The commissioner of public safety shall cause to be served upon the person who is in charge of any approved location and upon such parties as he may deem to be interested therein such reasonable notice as he may determine to be proper of his intention to suspend or revoke his location approval. There shall be included or attached to such notice a statement of the facts constituting the violation charged. Within three days after receipt thereof, such parties shall be entitled to a hearing before the commissioner of public safety. The action of the commissioner of public safety shall be conclusive and not subject to review. It shall be unlawful for any person, firm or corporation whose location approval has been suspended or revoked as herein provided to operate any pinball machine or device of like character at said location during the period of suspension or after revocation.

Section 6. Any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine in any sum not exceeding Three Hundred Dollars ($300.00), or by imprisonment in the city jail for a period not exceeding ninety (90) days, or by both such fine and imprisonment.

Section 7. That Ordinance No. A1250, passed the city council November 11, 1902, and entitled, "An ordi-

POOR COPY

BLEED THROUGH

nance to prohibit the maintaining, conducting, operating or using automatic nickel-in-the-slot machines, or other devices of like character, wherein there enters an element of chance, 'be, and the same is hereby, repealed.

Section 8. That Ordinance No. C8178, passed the city council April 23, 1945, and entitled, 'An Ordinance relating to public morality and good order in the City of Spokane, prohibiting the playing of pinball machines and devices of like character by persons under the age of twenty-one years, providing penalties for the violattion thereof, and declaring an emergency, be, and the same is hereby, repealed.

Section 9. This ordinance shall take effect and be in force thirty days from and after its passage.

Passed the city council December 29, 1947.

ARTHUR MEEHAN,
Mayor.

Attest:

A. A. BROWN,
City Clerk."

"SLOT MACHINES

ORDINANCE NO. A1250

An ordinance to prohibit the maintaining, conducting, operating or using automatic nickel-in-the-slot machines, or other devices of like character, wherein there enters an element of chance.

The City of Spokane does ordain as follows:

Section 1. Any person or persons who shall conduct, maintain or operate, either as owner or owners, proprietor or proprietors, lessee or lessees, employee or employees, agent or agents, any automatic nickel-in-the-slot machine, or other device of like character, wherein there enters an element of chance, whether the same be played or operated for money, checks, credits, or any other thing or representative of value redeem-

able in money, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than ten dollars nor more than one hundred dollars, and in default of the payment of the fine imposed shall be imprisoned in the city jail one day for each two dollars thereof.

Section 2. For the purposes of trial and conviction under this ordinance, the possession of any such machine or device that automatically pays money, or checks, or slugs, and commonly known as a cash machine, or keeping the same in any place accessible to the public, shall be prima facie evidence against the person in possession thereof of guilt under this ordinance.

Section 3. This ordinance shall take effect and be in force ten days after its passage.

Passed the city council November 11, 1902."

"Ordinance No. C8178

(By Colburn)

An ordinance relating to public morality and good order in the City of Spokane, prohibiting the playing of pinball machines and devices of like character by persons under the age of twenty-one years, providing penalties for the violation thereof, and declaring an emergency.

The City of Spokane does ordain:

Section 1. It shall be unlawful for any person, firm or corporation who conducts, maintains or operates, either as owner or owners, proprietor or proprietors, lessee or lessees, employee or employees, agent or agents, any pinball machine, or any other automatic or mechanical device of like character which may be played or operated for money, checks, credits, rewards or any other thing or representative of value to permit or allow any person under the age of twenty-one years to play or operate the same.

POOR COPY

BLEED THROUGH

Section 2. It shall be unlawful for any person under the age of twenty-one years to play or operate any pinball machine or any other automatic or mechanical device of like character which may be played or operated for money, checks, credits, rewards or any other thing or representative of value.

Section 3. Any person, firm or corporation violating any of the provisions of this ordinance, upon conviction thereof, shall be punished by a fine of not more than $300, or by imprisonment in the city jail for a period not exceeding ninety (90) days, or by both such fine and imprisonment.

Section 4. An urgency and emergency for the passage of this ordinance is hereby declared to, and does, exist, and the same shall take effect and be in force immediately upon its passage.

Passed the city council April 23, 1945.

F. G. SUTHERLIN,
Mayor.

Attest: W. N. SPROUL, City Clerk."

The Supreme Court reversed the trial court on the grounds and for the reason that a pinball machine is a gambling device within the definition of Remington's Revised Statute 2472, Laws of 1909, and that neither the City Commissioners nor the people of the city have the power to enact an ordinance in conflict with a general law of the state (R. 88).

The Supreme Court of the State of Washington assumed that at the municipal election Ordinance No. C10078 would be defeated and would in effect legalize the operation of pinball machines. The Supreme Court was silent, however, on the right of the people to vote the machines out or make them unlawful under their referendum privileges as provided by the State Constitution and the Charter of the City of Spokane. The Supreme Court likewise held

that Remington's Revised Statute 2472 was not repealed by Remington's Revised Statutes 2472-1, Laws of 1937, and Remington's Revised Statute 2472-2, Laws of 1937. The Court, however, was silent as to whether or not Remington's Revised Statute 2472 was not in fact repealed by Section 8370-100, Laws of 1941 Supplement, Remington's Revised Statutes.

The ruling of the trial court was such as to bring the case within the jurisdictional provisions heretofore relied on, in that the trial court held that the plaintiffs should be allowed to operate their lawful business until such time as the question was submitted to the electorate, and to deprive them of that right prior to the election would constitute an unlawful deprivation of plaintiffs' right to enjoy the use and possession of their property without due process of law, or without any process of law whatsoever. The ruling of the Supreme Court reversing the trial court's decision was such as to bring it within the jurisdictional provisions heretofore relied on, in that the Supreme Court of the State of Washington held that by virtue of Remington's Revised Statute 2472, Laws of 1909, prohibited plaintiffs from operating, and such prohibition by virtue of that statute was in fact due process of law.

The cases believed to sustain the jurisdiction of the United States Supreme Court are:

Craig v. *Harney,* 331 U. S. 367, 91 Law Edition 1546, p. 1551;

Ex rel. McCollum v. *Board of Education,* 333 U. S. 203, 92 Law Edition, 648;

Treichler v. *State of Wisconsin,* Volume 94 Law Edition, Advance Opinions No. 1, p. 21;

Terminiello v. *Chicago,* Vol. 93, Supreme Court Law Edition, Advance Opinions, p. 865, at p. 868.

POOR COPY

BLEED THROUGH

"Here claims based on the United States Constitution were plainly and reasonably made in the North Carolina suit. The North Carolina Supreme Court met these claims. It met them by saying that the North Carolina statute did not deal with substantive matters but merely with matters regulating local procedure, but whether claims are based upon a federal right or merely of local concern *is itself a federal question* on which this court and not the Supreme Court of North Carolina has the last say. That court could not put a federal claim aside as though it were not in litigation by the talismanic word 'jurisdiction'. When an asserted federal right is denied the sufficiency of the grounds of denial is for this court to decide. Bullington could have come here not merely by the grace of this court on certiorari but on appeal."

Angel v. *Bullington*, 330 U. S. 183, p. 188, 189, 91 Law Ed. 832, p. 836.

This appeal being from a state court, the grounds upon which it is contended that the questions involved are substantial is that the federal question sought to be reviewed was first raised in the trial court by virtue of pleadings in the Petition for Injunction. Paragraph XIV of plaintiffs' Petition for an Injunction reads as follows:

"That the threatened arbitrary, inequitable, unlawful, and fraudulent action of the defendants in seizing and confiscating pinball machines which belong to the plaintiffs, and in arresting the plaintiffs, is a direct invasion and abridgement of plaintiffs' property rights as defined by the Fourteenth Amendment to the Constitution of the United States, in that said action on defendants' part constitutes and will constitute unlawful deprivation of plaintiffs' right to enjoy the use and possession of their property without due process of law or without any process of law whatsoever, and is a direct violation of Sections 3 and 12 of Article I of the Constitution of the State of Washington, in that said acts will deprive the plaintiffs of liberty and property without due process of law."

That the threatened arbitrary, inequitable, unlawful and fraudulent action of the defendants in seizing and confiscating pinball machines which belong to the plaintiffs and arresting the plaintiffs is a direct invasion and abridgement of plaintiffs' property rights as defined by the Fourteenth Amendment to the Constitution of the United States, in that said action on defendants' part constitutes and will constitute unlawful deprivation of plaintiffs' right to enjoy the use and possession of their property without due process of law, or without any process of law whatsoever (R. 7).

The trial court held that the action of the City Council in effect deprived plaintiffs of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States (R. 38 to 54).

Quoting from Transcript of Proceedings, page 3, as follows:

> "You will observe, gentlemen, that the City Council, which is your legislative body, evidently took no action whatever upon the petition for referendum which had been certified by the City Clerk as having the required number of names to take the question of the enactment of the ordinances relating to pinball machines to a vote of the people of this city. It is not alleged that it was so ordered" (R. 40).

Quoting from Transcript of Proceedings, pp. 5 and 6:

> ". . .
>
> "THE COURT: Yes, very well. I beg your pardon, Mr. Farley, you are quite correct. However, it will be stipulated that the City Council on the 13th day of May, 1949, moved and passed the resolution which I have just read, that is true, isn't it, or correct?
>
> "Mr. Farley: Yes.
>
> "The Court: Now, the question of the legality or illegality of pinball machines will not be passed on at this time by me. I take it that the crux of this entire

POOR COPY

BLEED THROUGH

proceeding is whether or not the people of the City of Spokane shall be given the right to vote as provided in Section 83 of the Charter on referendum. Personally, I am very much in favor of referring questions to the people for their ultimate determination. It is an admitted fact that the advisory ballot taken on the question of the operation of slot machines and pinball machines at the recent election was merely advisory. Why it was done in that manner I do not know. You can draw your own inferences. Every legislative body has an inherent duty to act and perform their duties in a manner that is required under the law and the ordinance in the instant case of the City of Spokane. If I am wrong in my conclusion that the people of the city shall have a right to pass upon the question of the adoption of the ordinance in question the Supreme Court of this State will be very happy to correct my error and I hope that this case is taken to the Supreme Court for determination of the right of referendum on this question" (Record 6-7).

Quoting from Transcript of Proceedings, pp. 9 and 10.

"The Court: There has been no determination of that question. Then, as I understand you, Mr. Losey, you would deprive the people of the right to pass upon this ordinance notwithstanding Section 83 of the City Charter, adopted by the people many years ago, relating to the referendums.

"• • •

"The Court: No, I thought it was understood, Mr. Farley, that from my views expressed to all of you, that the people, in my opinion, were entitled to the right of referendum on this question; that compliance had been made by ten percent or more of the total vote cast at the last election; that that vote had been certified by the City Clerk and that is merely a question of whether the people should be denied the right and privilege that they have reserved to themselves in their Charter and that I was of the view that they should not be" (R. 45-46).

Quoting from Transcript of Proceedings, pp. 14 and 15.

> "The Court: Well, I think there is no question about that, no question at all, Mr. Schiffner. Let me point out to you, if you please, sir, that we have the right of referendum in this State and surely there is no prohibition in any of the state laws in respect to the right of referendum as reserved in the City Charter of Spokane" (R. 49-50).

Quoting from pp. 19 and 20, Transcript of Proceedings.

> "The Court: • • •
>
> "Now, perhaps, this is the way to get at it but still you would deny the right of the people to pass upon the question of whether they wished the ordinance to be enacted and in effect controlling pinball machines.
>
> "• • •
>
> "Gentlemen, it is my opinion that the injunction should be continued in force and effect until such time as the city commissioners or city council of Spokane calls an election, either special or regular, to refer the matter or the question to the people of the City of Spokane, and until the final result of that vote there is no determination" (R. 53-54).

The State Supreme Court did not pass upon or discuss the federal constitutional question involved under the due process clause of the Fourteenth Amendment to the Constitution other than by inference where it states:

> "The argument has been made that, in the interest of local self-government, the ordinance should be submitted to the people of Spokane for their approval or rejection. The contention would be unanswerable were it not for the constitutional provision contained in Art. XI, Sec. 10, and our laws as passed by the legislature. All acts of the people and their representatives, regardless of the virtue of those acts, must yield to the provisions of our constitution" (R. 88).

POOR COPY

BLEED THROUGH

It will be observed that under this language and the construction of the state statutes involved in this case, as well as the ordinances and portions of the state constitution, that the people are refused the privilege of enacting a local ordinance the same or similar to an existing state law. The State Supreme Court assumes that the people of Spokane would, if an election were called, legalize the operation of pinball machines. They fail to take into consideration that at the election to be called they, by their vote, might make the operation of pinball machines within the City of Spokane unlawful, the same as the state law is claimed to do by the Supreme Court. In any event, the Supreme Court is in error in assuming that the citizens of Spokane would endeavor to legalize the operation of pinball machines, for such an assumption is assuming facts not in existence, not in the record, wholly conjectural and imaginary, and by that assumption the Supreme Court of the state has in fact placed a prohibition upon the right of referendum within the State of Washington.

It is respectfully called to the Court's attention that in addition to the reasons heretofore cited, as violating the due process clause of the Fourteenth Amendment of the Constitution of the United States, the Supreme Court of the State of Washington in fact found a violation of the criminal statute, in an equity proceedings by "judicial notice" rather than upon any evidence in the record. Such a finding or judgment is in fact a violation of the due process clause as tested and laid down by this Court in the case of *Anderson National Bank* v. *Luckett*, 321 U. S. 233, p. 246; 88 Law Ed. 692, p. 704, when this Court stated:

> "What is due process • • • must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceedings appropriate to the nature of the case • • • The funda-

mental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the rights for which constitutional protection is invoked."

The State Supreme Court by virtue of its decision held in effect that the appellants have violated the criminal statute and are guilty of a crime without allowing appellants the right to defend themselves, all of which was done in an equity proceeding (R. 88). It was specifically requested by the appellants that in the event the State Supreme Court should reverse the case, then in that event the cause be remanded to the trial court to take additional testimony to establish whether or not pinball machines were "in fact" in violation of Remington's Revised Statutes 2472, but such request was denied by the state court (R. 88). The decisions of the state are uniform in holding that a court of equity in an injunction proceedings is limited to the function of establishing whether or not the statute or ordinance is valid or invalid and may not inquire into the question of fact whether in fact a crime has been committed, such question of fact being limited to the forum of a criminal prosecution.

Ajax v. *Gregory,* 177 Wash. 465, at p. 476, 32 Pac. (2) 560;

Great Northern Railway Co. v. *State,* 184 Wash. 648, at p. 652, 52 Pac. (2) 1274;

State ex rel. Potter v. *Maybury,* 161 Wash. 142, p. 149, 296 Pac. 566;

Brennen v. *Seattle,* 151 Wash. 665, at p. 668, 276 Pac. 886.

When the validity of the statute has been determined, the equity suit ends and that validity is determined not upon evidence taken but only upon facts on which the Court may take judicial knowledge.

Ajax v. *Gregory,* 177 Wash. 465, p. 476, 32 Pac. (2) 560;

POOR COPY

BLEED THROUGH

Great Northern Railway Co. v. *State,* 184 Wash. 648, p. 652, 52 Pac. (2) 1274;
Gottstein v. *Lister,* 88 Wash. 462, p. 482, 483, 153 Pac. 595.

The equity court concerns itself only with the facts relating to the validity of the statute and not with facts relating to its criminal violation, and the court having jurisdiction over criminal offenses is the forum in which such question of fact must be determined.

State ex rel. Potter v. *Maybury,* 161 Wash. 142, p. 149, 296 Pac. 566.

For the state court to hold that the appellants' business, which up to this time had been lawful and specifically authorized by municipal ordinances, was in fact a violation of a criminal statute, which statute did not specifically define or set out pinball machines, was in fact a violation of the due process clause as defined by *Anderson National Bank* v. *Luckett, supra.*

Dated this 5th day of January, 1950.

JOHN F. GARVIN,
503 Lyon Building
670—3rd Street,
Seattle, Washington,
CLAUDE L. DAWSON,
917 15th Street, N. W.,
Washington, D. C.
WILMOT W. GARVIN,
605 Columbia Building,
Spokane, Washington,
THOMAS I. OAKSHOTT,
Collins Building,
Colville, Washington,
Attorneys for Appellants.

APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF WASHINGTON, September Term, 1949

No. 31140

Department Two

Filed November 9, 1949

GERALD MILLER and DAVID CAUDILL, for Themselves and for the Benefit of Others Similarly Situated, *Respondents*,

vs.

CITY OF SPOKANE, a Municipal Corporation; WILLIAM P. PAYNE, Commissioner of Public Safety; E. W. PARSONS, Chief of Police; WILLARD TAFT, KENNETH LAWSON, ARTHUR R. MEEHAN and WALLACE N. SPROUL, City Commissioners, all Public Officials of the City of Spokane, Washington, *Appellants*

Appeal from the Superior Court for Spokane County

Honorable W. LOX JOHNSON, *Judge*. Reversed:

Plaintiffs, operators of pinball machines, sought by this action to restrain the city of Spokane and certain of its officers from arresting or molesting plaintiffs while in the possession of, and operating, the machines in the city of Spokane. It was contended in the answer of defendants that the machines were gambling devices and, therefore, prohibited by law.

A trial to the court resulted in the issuance of a permanent injunction which restrained defendants from molesting or arresting plaintiffs or others similarly situated for having in their possession, and operating pinball machines in the city of Spokane. Defendants then appealed to this court, and, in so doing, assign as error the action of the superior court in entering its decree.

The facts, gathered from the admitted portions of the pleadings and the statement of facts, are these:

POOR COPY

BLEED THROUGH

December 29, 1947, the city commissioners of the city of Spokane passed two ordinances. One, numbered C 9441, prohibited the playing of pinball machines, by minors, and required that, before any pinball machines should be placed in operation, the operators must have the approval of the commissioner of public safety. The other ordinance, numbered C 9438, amended ordinance numbered C 8352. These last mentioned ordinances authorized the operation of pinball machines and imposed a tax upon them.

March 28, 1949, the city commissioners passed ordinance No. C 10078. This act repealed ordinance No. C 9441, and prohibited the possession, maintenance, conduct, operation or use of pinball machines. Prior to the effective date of ordinance No. C 10078, the voters of the city of Spokane filed, in accordance with the provisions of the city charter, a referendum petition signed by the required number of voters, which challenged and sought to submit to the voters ordinance No. C 10078. Thereafter, on May 13, 1949, the city commissioners of the city of Spokane passed a resolution which notified all possessors or users of pinball machines that they would be prosecuted. This action was then instituted.

Respondents maintain that the referendum petition, having been properly signed and filed, renders ordinance No. C 10078 ineffective unless and until it may be adopted by the people. Appellants, on the other hand, take the position that a pinball machine is a gambling device prohibited by the general laws of the state of Washington, and that neither the city commission nor the people of the city have the power to enact an ordinance in conflict with general laws of the state. As we understand them, they contend further that, a defeat of ordinance No. C 10078 would in effect legalize the operation of pinball machines.

We agree that a city, regardless of the fact that its charter provides for a referendum, may not pass any ordinance which puts into effect a law which is in conflict with the statutes of the state. Even a casual survey of the ordinances, to which we have referred, brings to light the fact that the defeat of ordinance No. C 10078 would leave intact those ordinances of the city which legalize the owning

and operating of pinball machines. The rule to which we have referred is laid down in Art. XI, Sec. 10, of our state constitution, where it provides:

> ". . . cities or towns heretofore or hereafter organized and all charters thereof framed or adopted by authority of this constitution shall be subject to and controlled by general laws."

In Neils v. Seattle, 185 Wash. 269, 53 P. (2d) 848, this court said:

> "A general law enacted by the legislature is superior to, and supersedes, all charter provisions inconsistent therewith."

The case of Armitage v. Camden, 5 N. J. Misc. 129, 135 Atl. 661, is so decisive of the question presented here that we quote it in full:

> "Per CURIAM:
>
> "This writ brings up for review a resolution of the board of commissioners of the city of Camden, passed August 12th, 1926, submitting to the legal voters of that city for their action, by approval or disapproval, a proposed ordinance permitting baseball games, either amateur or professional, on Sundays.
>
> "There are several reasons argued why this resolution should be set aside, but the matter can be disposed of under a single one of these, and that is that no action taken or to be taken by the authorities of the city of Camden, or the legal voters thereof, in the face of an emphatic and positive legislative declaration of policy, can be effective. This is so fundamental that no citation of authorities is called for.
>
> "The proposed ordinance, if adopted, would by its terms legalize acts in the city of Camden which the supreme law making body of the state has prohibited by that legislation known as the Vice and Immorality act.

POOR COPY

BLEED THROUGH

"The resolution under review must therefore be set aside, with costs."

Among the decisions of this court lending support to this conclusion we note the following: State ex rel, Seattle v. Carson, 6 Wash. 250, 33 Pac. 428; Benton v. Seattle Electric Co., 50 Wash. 156, 96 Pac. 1033; State ex rel. Clausen v. Burr, 65 Wash. 524, 118 Pac. 639; Dolan v. Puget Sound Traction Light & Power Co., 72 Wash. 343, 130 Pac. 353; and Misich v. McGuire, 24 Wn. (2d) 758, 167 P. (2d) 462.

Rem. Rev. Stat., Sec. 2472, provides:

"Possession of gambling devices. Every person who shall have in his possession or shall permit to be placed or kept in any building or boat, or part thereof, owned, leased or occupied by him, any table, slot machine, or any other article, device or apparatus of a kind commonly used for gambling, or operated for the losing or winning of any money or property, or any representative of either, upon any chance or uncertain or contingent event, shall be guilty of a gross misdemeanor."

A city may enact ordinances for the punishment of offenses already made punishable by state law. Seattle v. Chin Let, 19 Wash. 38, 52 Pac. 324.

Is a pinball machine a gambling device?

It was stipulated during the trial that certain facts as alleged in the city's affirmative defense were true. That defense was as follows:

"The cabinets of said pinball machines have a flat horizontal top in the shape of a rectangular table, mounted upon a base, with one end of the table at a lower elevation than the other. The game is played on the top of said table by the use of a plunger which propels a metal ball to the top of said table, from which point the ball rolls to the lower end unless it falls into one of a number of holes in the surface of said table. There are four series of holes, numbered from 1 to 7, inclusive, which numbers correspond to numbers lighted on a backboard set above the high end of the

table. The game is played by placing a nickel in a coin slot which causes a metal ball to drop into a receptacle from which receptacle it may be elevated to the playing surface of the board by the player, so that the ball is in a channel which extends the length of the right-hand side of said table and directly in front of the plunger. The insertion of the coin also causes one or several numbers of the backboard to light, and the object of the game is then for the player to put the metal ball into one of the holes on the table which corresponds with a number or numbers which may be lighted on the backboard. The insertion of the coin also indicates the odds which the player will receive in the event he is successful in putting the ball into a proper hole. The ball is shot by pulling the plunger back along a scale, marked by degrees, and then releasing the plunger. The distance from the ball at which the plunger is released determines the speed which the ball will have when propelled from the channel on the playing surface on the table. In addition to the holes on said table, there are metal springs and pins at various places between the holes. If the player is successful in lodging the ball in a hole which corresponds to one of the numbers lighted on the backboard, the machine automatically returns to him the number of nickels shown in the list of odds on the backboard, and, if not successful in lodging the ball in one of said holes, he receives nothing."

It was further agreed in open court as follows:

". . . that said machines are so constructed that the lighted numbers on the back-board are determined and automatically lighted by the machine and the player has no choice in the selection thereof on the first coin but ultimately he may obtain the number which he desires to select by inserting additional coins until such number appears. Likewise, the odds which will be paid if the player is successful are automatically determined by the machine without any choice

POOR COPY

BLEED THROUGH

on the part of the player and all odds except the minimum odds to be paid are selected automatically by the machine. Said machines are so constructed that the pitch of the incline of the playing surface can be adjusted by the person having control of the machine but not the player, which pitch determines the speed of the ball as it travels downward over the playing surface."

We now call attention to cases from nineteen states of the Union which declare that pinball machines are gambling devices.

A great number of these cases may be found in 135 A. L. R. 149. Other cases are: State ex rel. Dussault v. Kilburn, 111 Mont. 400, 109 P. (2d) 1113, 135 A. L. R. 99; State v. Wiley, 232 Iowa 443, 3 N. W. (2d) 620; Pepple v. Headrick, 64 Idaho 132, 128 P. (2d) 757; Kraus v. Cleveland, 135 Ohio St. 43, 19 N. E. (2d) 159; Approximately Fifty-Nine Gambling Devices v. People ex rel. Burke, 110 Colo. 82, 130 P. (2d) 920; People v. One Pinball Machine, 316 Ill. App. 161, 44 N. E. (2d) 950; Steely v. Commonwealth, 291 Ky. 554, 164 S. W. (2d) 977; Hunter v. Mayor and Council of Teaneck Tp., 128 N. J. L. 164, 24 A. (2d) 553; Urban's Appeal, 148, Pa. Super Ct. 101, 24 A. (2d) 756; State v. Betti, 21 N. J. Misc. 345, 34 A. (2d) 91; Steed v. State, 189 Ark. 389, 72 S. W. (2d) 542; and Prickett v. State, -- Okla. Crim. —, 200 P. (2d) 457.

We shall content ourselves with referring to but one of the cases, and that one is the case of State ex rel. Dussault v. Kilburn, *supra.* In that case, the pinball machine was described as

". . . a cabinet or stand about three and one-half or four feet high with a sloping plane or surface studded with small steel pins and containing holes. It has a catapult by the use of which a marble or ball is shot onto the plane with the object of having the ball enter one of the paying holes. To play the game a person places a nickel or a trade check in a slot in the machine. This places the marble or ball in a position for playing.

The trade checks are redeemable in merchandise at the rate of 5 cents or more for each trade check as stamped on each at Kilburn's place of business, and not elsewhere. The machine is so constructed that the pay-off is in trade checks only and not in money. The number of checks received in the pay-off varies according to the hole in which the marble or ball falls. If the player is not successful in getting the marble into one of the proper holes, he receives nothing on the play. The marble or ball is shot from a spring or mechanical device. The power with which the ball is shot depends upon how far back the spring is pulled and, hence, is subject to the control of the player. . . .

" 'The board, in turn, has holes with numbers below the holes corresponding with the numbers that may be lighted on the back board; the lights naturally are operated from electrical spinners; the spinners turn and stop on certain switches that turn on certain lights on the back board; then the player must shoot the ball into a hole that corresponds with the light that is lit. The machine also has an electrical and mechanical pay-out mechanism that pays out trade checks, hickeys, etc. Well, after the coin is inserted in the slot that starts the machine in operation why there is a spinner or electrical disk, a disk with electrical fingers, or brass fingers, that turn on from an electrical motor, we might say a vibrator, and these fingers, in turn, stop on certain electrical switches that light corresponding numbers on the back board; there may be one light or up to seven, there are seven different characters, and from one to seven may be lighted on this particular operation; then in turn the player must shoot at the hole that corresponds with the number that is lighted in the back board."

In its determination that the machine was a gambling device, the court said:

"The question before us is whether the use of the machine constitutes a nuisance under section 11124, Re-

POOR COPY

BLEED THROUGH

vised Codes. If its use constitutes gambling as defined by other sections, then the building in which it is used is a nuisance. Whether or not it is a gambling device depends upon section 11159, Revised Codes, as amended by Chapter 153, Laws 1937. That section makes it a misdemeanor for any person to conduct, run or operate 'any game of chance played with * * * any device whatsoever,' or to run or conduct or keep any slot machine, or other similar machine or device, for 'money, checks, credits, or any representative of value.' It provides, however, that certain types of business may procure a license to operate tables for the use and pleasure of their customers where certain games may be played for pastime and amusement 'and for the maintenance of which a charge may be made, to be paid by the users by the purchase of trade checks which must be redeemable in merchandise at the going retail price of such merchandise, which is the stock in trade of such business.' It also provides that upon the payment of a license, places of business may exhibit for use and sale to customers 'trade stimulators, such as pull boards and ticket boards, where each board so used returns to the owner or business not to exceed the going retail price of the goods disposed of and sold and disposed of through the use of the same.'

"The court was correct in holding that the device in question is condemned by Chapter 153. Machines of similar construction and operation have been held to be gambling devices. In *Howle v. City of Birmingham*, 229 Ala. 666, 159 So. 206, 209, the court in speaking of a machine not wholly dissimilar to that here said: 'The game is clearly a gambling contest with the owner and operator on the one side, and the members of the public on the other, who, while seeking a moment of diversion, are willing to hazard a nickel with the hope of winning three times that amount, and in which, as the facts alleged in the bill and the admitted facts show, the owner and operator hold the whip handle, and eventually win the stakes in the profits which the machine takes.'"

The court also quoted with approval from State v. Coats, 158 Ore. 122, 74 P. (2d) 1102, as follows:

> " 'To say that the operation of pinball machines or slot machines involves any substantial degree of judgment or skill severely strains the credulity of any reasonable-minded person. Such machines are constructed to win, and they do win. In a game involving skill or judgment, the player has a fair opportunity to win. Such opportunity is not afforded the player who "bucks" a slot machine or a pinball machine. No judgment or skill which the player may exercise has any appreciable effect upon the result. * * * It is perfectly obvious from the information that the only act which the player can, by possibility, perform to influence the result of this operation is to pull back the plunger a greater or lesser distance, and thereby, in its initial stages, regulate the speed of the ball. He can send the ball to the playing surface at greater or lesser speed, but he cannot guide or influence its course after it gets there. He cannot aim at anything, as in a game of billiards, or baseball or golf, but is absolutely limited by the mechanics of the device to propelling the ball along the so-called channel to the upper end of the table.' "

Based upon these cases, we hold that the pinball machines named in the Spokane ordinance were gambling devices within the meaning of Rem. Rev. Stat., Sec. 2472, and, as such, could not be legalized by either the city commissioners of the city of Spokane, or the people of that city acting in a legislative capacity.

Respondents contend that if this case is reversed, it should be sent back to the superior court for the purpose of taking additional evidence. We cannot so hold. The case was submitted to the court upon the stipulated facts. It was decided upon the facts. This court, hearing the cause *de novo*, decided the case upon those facts.

Respondents are of the opinion that Rem. Rev. Stat., Sec. 2472, was, by implication, repealed by Rem. Rev. Stat. (Sup.), Sec. 2472-1. We cannot yield our assent to that

POOR COPY

BLEED THROUGH

view. Repeals by implication are not favored. Abel *v.* Diking & Drainage Imp. Dist. No. 4, 19 Wn. (2d) 356, 142 P. (2d) 1017.

A reading of Rem. Rev. Stat. (Sup.), Sec. 2472-1, in connection with other portions of chapter 119, Laws of 1937, of which it is a part, indicates in unmistakable language that it had to do entirely with slot machines. With these considerations in mind, we hold that Rem. Rev. Stat., Sec. 2472, was not repealed by the later act.

The argument has been made that, in the interest of local self-government, the ordinance should be submitted to the people of Spokane for their approval or rejection. The contention would be unanswerable were it not for the constitutional provision contained in Art. XI, Sec. 10, and our laws as passed by the legislature. All acts of the people and their representatives, regardless of the virtue of those acts, must yield to the provisions of our constitution.

The judgment of the trial court is reversed, with instructions to dismiss the action.

SIMPSON, *C. J.*

We concur:

ROBINSON, *J.*
MALLERY, *J.*
HILL, *J.*
HAMLEY, *J.*

APPENDIX "B"

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

No. 124,422

GERALD MILLER, et al., *Plaintiffs*,

vs.

CITY OF SPOKANE, et al., *Defendants*

Be it remembered:

That the above-entitled action came regularly on for trial and determination on June 3rd, 1949, before the Hon. W. Lon Johnson, Judge, without a jury, in the Superior Court of the State of Washington, in and for the County of Spokane, Spokane, Washington, sitting pro tem therein; the plaintiffs appearing in person and by Wilmot W. Garvin and Clarence M. George, their attorneys; the defendants appearing by B. A. Farley and Paul F. Schiffner; and both sides having announced they were ready for trial;

Whereupon, the following proceedings were had, to-wit:

The Court: We have had quite an extensive pre-trial conference in this case, the case of Gerald Miller and David Caudill versus the City of Spokane, and others; the plaintiffs represented by Mr. Wilmot W. Garvin and the defendants represented by Mr. Farley and Mr. Schiffner.

My practice has been for many years to have pre-trial conferences in all cases and out of those conferences with counsel we usually are able to eliminate many elements that are really of no importance in the trial of the case. However, after conference with the attorneys representing the plaintiffs and defendants, after stating to them frankly my view of the pleadings, the facts and the law, and they equally as frank with me, we have come to certain conclusions based upon my opinion of what ought to be done in this case.

At the time the City Charter was adopted and approved by the people of the City of Spokane, Section 83 of that

POOR COPY

BLEED THROUGH

Charter provides that a referendum may be invoked under certain conditions, on acts and ordinances, particularly, of the City Council. In order that there may be no misunderstanding of the conclusions arrived at by respective counsel and myself, I shall read that Charter provision as alleged in plaintiffs' complaint: (reading)

"That Section 83 of the Charter of the City of Spokane reads as follows:

> "If prior to the date when any ordinance shall take effect a petition signed by qualified electors equal in number to ten percentum of the entire vote cast at the last preceding general municipal election, shall be filed with the Clerk protesting against the enactment of such ordinance, it shall be suspended from taking effect. Immediately upon the filing of the petition the Clerk shall do all things required by Section 82B of this Article. Thereupon the council shall immediately reconsider such ordinance and, if it do not entirely repeal the same, shall submit it to public vote at the next municipal election; or, the council in its discretion may call a special election for that purpose; and such ordinance shall not take effect, unless a majority of the qualified electors voting thereon at such election shall vote in favor thereof;"

and further the allegations of that paragraph, which is Paragraph V: (reading)

> "That prior to the date when said Ordinance C 10078 was to take effect a petition signed by qualified electors equal in number to ten percentum of the entire vote cast at the last preceding general municipal election was filed with the City Clerk protesting against the enactment of such ordinance, and that the City Clerk within the required time certified to the City Council that qualified and registered electors equal in number to ten per cent of the entire vote cast in the last preceding general municipal election had signed said petition for referendum. That on May 13, 1949, the City Commissioners in council reconsidered said

Ordinance No. C 10078 and moved that said ordinance be submitted to popular vote at the next municipal election, as provided by the City Charter."

You will observe, gentlemen, that the City Council, which is your legislative body, evidently took no action whatever upon the petition for referendum which had been certified by the City Clerk as having the required number of names to take the question of the enactment of the ordinance relating to pin ball machines to a vote of the people of this city. It is not alleged that it was so ordered.

Then, in Paragraph VI:

"That the said petition was signed by qualified and registered electors equal in number to ten per cent of the entire vote cast at the last preceding general municipal election; that immediately upon the certification by the City Clerk that qualified and registered electors of the City of Spokane equal to ten per cent of the entire vote cast at the last preceding general municipal election had signed the above-mentioned petition for referendum which was filed with said City Clerk, Ordinance No. C 10078 was suspended from taking effect, but that contrary to the prohibition and mandate by virtue of the referendum filed and certified and by virtue of the said section of the Charter of the City of Spokane on the 13th day of May, 1949, said City Commissioners in council moved and passed the following resolution:

"All persons operating or having in their possession pinball machines contrary to Remington's Revised Statutes 2472 and the provisions of Section 22 of Ordinance No. C 1377 of the City of Spokane, be hereby notified that arrest for such violations will commence on the 23rd day of May, 1949."

"That such action by the City Council is in direct violation and contrary to the city charter and is an attack upon the right of referendum of the registered and qualified voters of the City of Spokane, as established in said charter."

POOR COPY

It is now agreed between respective counsel that it will be stipulated in open court that Section 83 of the City Charter is as I have read and as alleged in the complaint. It will, also, be stipulated that the City Council has refused up to the present time to take any action whatever whereby the people of the City of Spokane would be permitted to vote upon this question, the legality or illegality, is that correct?

Mr. Farley: Just to clarify the situation, your Honor stated a few moments ago that the Council took no action. May I call your Honor's attention to the last sentence in Paragraph V of the Complaint in which it is stated that on May 13th, 1949, the city commissioners in council reconsidered said ordinance and moved that said ordinance be submitted to popular vote at the next municipal election and, then, there were the added words, which I think counsel will concede "if such action is necessary".

The Court: Yes, very well. I beg your pardon, Mr. Farley, you are quite correct. However, it will be stipulated that the City Council on the 13th day of May, 1949, moved and passed the resolution which I have just read, that is true, isn't it, or correct?

Mr. Farley: Yes.

The Court: Now, the question of the legality or illegality of pinball machines will not be passed on at this time by me. I take it that the crux of this entire proceeding is whether or not the people of the City of Spokane shall be given the right to vote as provided in Section 83 of the Charter on referendum. Personally, I am very much in favor of referring questions to the people for their ultimate determination. It is an admitted fact that the advisory ballot taken on the question of the operation of slot machines and pinball machines at the recent election was merely advisory. Why it was done in that manner I do not know. You can draw your own inferences. Every legislative body has an inherent duty to act and perform their duties in a manner that is required under the law and the ordinance in the instant case of the City of Spokane. If I am wrong in my conclusion that the people of the city shall have a right to pass upon the question of the adoption of the ordinance in question the

Supreme Court of this State will be very happy to correct my error and I hope that this case is taken to the Supreme Court for determination of the right of referendum on this question.

Now, gentlemen, you may stipulate as you have agreed upon the affirmative defense as alleged by the City of Spokane and its commissioners.

Mr. Garvin: May it please the Court, if I may make an addition to the statement made by the Court in relation to the Court and counsel being present in chambers on the pretrial discussion, may the record show that Mr. Losey, W. C. Losey, appeared as amicus curiae, too.

The Court: And that you all came there, except Mr. Losey, to confer at my request.

Mr. Garvin: It is stipulated by the parties through their respective counsel that the facts as alleged in the defendant City of Spokane's affirmative defense are true. It is further stipulated that in regard to the second affirmative defense, second paragraph of the affirmative defense that it shall read as follows: that said machines are so constructed that the lighted numbers on the back-board are determined and automatically lighted by the machine and the player has no choice in the selection thereof on the first coin but ultimately he may obtain the number which he desires to select by inserting additional coins until such number appears. Likewise, the odds which will be paid if the player is successful are automatically determined by the machine without any choice on the part of the player and all odds except the minimum odds to be paid are selected automatically by the machine. Said machines are so constructed that the pitch of the incline of the playing surface can be adjusted by the person having control of the machine but not the player, which pitch determines the speed of the ball as it travels downward over the playing surface.

The balance of the pleadings, being conclusions, are denied; the balance of Paragraph II, being conclusions, are denied. Mr. George, likewise, has some ordinance to be admitted in evidence by stipulation.

Mr. Farley: Just a moment, Mr. Garvin, so that there will be no question Mr. Garvin read into the record what we

POOR COPY

BLEED THROUGH

might say is substituted for our second paragraph of the affirmative defense and I will ask him, now, if it isn't your intention that those facts as read are admitted?

Mr. Garvin: Yes, that is true. It is further stipulated that the following sections of the Charter of the City of Spokane and the ordinances either are in effect, were in effect at one time or were repealed or amended and they have relation to the case at bar:

Article IX Section 83 relating to the referendum, Chapter 1.

Ordinance No. C 9441 relating to the regulation and control of pinball machines in the City of Spokane.

Ordinance No. C 1377 relating to gambling within the City of Spokane.

Ordinance No. C 1377, Section 22, relating to gambling devices within the City of Spokane.

Ordinance No. C 8178, relating to the playing of slot machines by minors.

Ordinance No. A 1250, relating to slot machines in the City of Spokane.

Ordinance No. C 177, relating to—10077, ten thousand seventy-seven, relating to the playing of slot machines within the City of Spokane.

Ordinance No. C 10078, relating to the playing of pinball machines in the City of Spokane.

And Ordinance No. C 8352, relating to taxation in the City of Spokane,

The Court: Any objections to the admission?

Mr. Farley: No, with this exception, however, some of these ordinances have been repealed and we would like to take the time to go through them so that the record will show which of these ordinances have been repealed.

The Court: Very well, Mr. Farley. I believe that Mr. Mr. Garvin has alleged in his complaint those that were repealed by number and the ordinances that were the repealing ordinances.

Mr. Garvin: That is true. They were either repealed or amended. The purpose of that, if it please the Court, was merely to show the historical background chronologically.

Mr. Farley: Maybe you can clear this thing up for me. Are all these ordinances that you are now introducing pleaded in your complaint? I think that there are some that are not.

Mr. George: They are either pleaded in the complaint or set up as exhibits.

The Court: Do you wish to examine the original complaint?

Mr. Garvin: If that is not true, I am willing to stipulate so that the record will be perfectly clear on that with Mr. Farley.

The Court: Mr. Losey, do you have any suggestions to make at this time as a friend of the Court?

Mr. Losey: I think the proceeding is going along in order. I think, however, there is some matter that ought to come before the Court as to whether or not it's possible to have a referendum on a law that is illegal.

The Court: There has been no determination of that question. Then, as I understand you, Mr. Losey, you would deprive the people of the right to pass upon this ordinance notwithstanding Section 83 of the City Charter, adopted by the people many years ago, relating to the referendums.

Mr. Losey: It is my contention, your Honor, that this ordinance which is being referred to is wholly supernumerary and wholly unnecessary and illegal and that you can not have a referendum on an illegal law. I think Mr. Schiffner has authority to sustain that position.

Mr. Farley: I thought we had the understanding that your Honor would give us the opportunity to be heard on that one point, on the referendum question.

The Court: At this time?

Mr. Farley: Yes, or am I mistaken in that respect?

The Court: No, I thought it was understood, Mr. Farley, that from my views expressed to all of you, that the people, in my opinion, were entitled to the right of referendum on this question; that compliance had been made by ten percent or more of the total vote cast at the last election; that that vote had been certified by the City Clerk and that is merely a question of whether the people should be denied the right and privilege that they have reserved to

POOR COPY

BLEED THROUGH

themselves in their Charter and that I was of the view that they should not be. Now, if you wish to be heard, I shall not preclude you.

Mr. Farley: I am sorry if I misunderstood your Honor. I understood clearly what your Honor has just said. I thought you had agreed that we would have a right to be heard on that question.

The Court: All right. Of course, I have expressed myself on a number of questions, including the famous or infamous slot machines. I shall withdraw the word "infamous". Judge Pettijohn decided that question in 1947, from which there was no appeal. I stated that to you men and you agreed that was true. And I said the record was filled with inconsistencies from that time up to the present; that I disliked very much and resent at any time and at all times a mockery being made of the courts. And, further, I stated that that is precisely what has been done by reason of the inconsistencies of ordinances, repealing ordinances and enacting ordinances since the decision of Judge Pettijohn. Now, that has no bearing upon this question except that he held that slot machines were gambling devices beyond any question of doubt, as stated and set forth in the constitution of the State and by city ordinances. I was even unable to find his opinion in the case that he tried. It does have a correlation and a connection with this case but I was of the view, Mr. Farley, that by reason of the explicit statements contained in Section 83 of the Charter of the City of Spokane a right of referendum which the people had reserved to themselves and with their full compliance, as shown by the certification of the vote by the City Clerk, that they should not under any pretext or fallacious reasoning be denied and deprived of that right of referendum. I think I used that language, approximately.

Mr. Schiffner: Your Honor please, we would like to argue the point. We don't believe in this case that the council have the right to refer this to the people.

The Court: I never like to deny the right of counsel, Mr. Schiffner, to argue any question of law that they think is pertinent and proper. Do you mean to say that you

have cases, let us say, holding the constitution of the State or of city charters where the people have made certain reservations in respect to the rights that they have retained for themselves, that the courts have held that they shall ever be deprived of those rights? The truth is, Mr. Schiffner, as I expressed in chambers, that too much of the government has been taken from the people, as I view it, of our respective states, cities and counties and even including the national government. Are we going to continue that policy?

Mr. Schiffner: We generally concede your Honor's general observations; with reference to referendums we heartily agree with reference to your observations. However, with reference to this particular case we do not believe that they have a right to refer this matter to the people for a vote, notwithstanding the procedures of the Charter which were followed. I think if your Honor will hear us out we can convince you that they do not have that right to bring this to a vote at the next election, if our position is sound.

The Court: Now, listen, I don't want to deprive you of the right to argue the questions of law in this case but I will say this to you very frankly: you must have cases that are definite, positive and are in point. They have held, referring to our own Supreme Court, that the people, where they reserve to themselves certain inalienable rights, cannot be deprived of them by the assertion that an ordinance or a statute is illegal and, therefore, they are not entitled to that right of referendum. You will have to show me most clearly.

Mr. Farley: I wonder, your Honor, if we shouldn't complete our record, first.

The Court: Oh, I thought you had finished.

Mr. Farley: No. We agree that the ordinances which counsel has offered here may be received and I would like to have counsel stipulate that Ordinance No. C 1377 passed the City Council on July 3rd, 1913, and entitled "An Ordinance for the preservation of Public Peace, Safety, Morality and Good Order in the City of Spokane, providing penalties for the violation thereof and declaring an emergency" might be considered as if it had been offered in evidence?

POOR COPY

BLEED THROUGH

The Court: Will you so stipulate, Mr. Garvin?

Mr. Garvin: We offered that ourselves.

The Court: That is my understanding.

Mr. Farley: Oh, I am sorry. I missed that number, it seems like.

The Court: Now, are there any other ordinances or parts of ordinances or repeals or enactments that you wish to introduce in this case?

Mr. Farley: None on the part of the defendants.

The Court: Now, Mr. Schiffner.

Mr. Schiffner: Your Honor, it is a little embarrassing in view of some more recent remarks that the Court has made as to how to proceed with this argument. We want to make a frank and full discussion of the law that we think is applicable to this case. As I say, we generally believe in all legal laws that the people have a right to referendum and we have jealously guarded, on past occasions, that right and we have been in this court defending it. However, in this case we do not believe that the matter of the continued operation of the pinball machines is a question that is referable to the people and I would like to proceed with my reasons, if the Court please, for making that statement.

Section 10, of Article XI of the State Constitution provides as follows, in part: (section read.)

The Court: Well, I think there is no question about that, no question at all, Mr. Schiffner. Let me point out to you, if you please, sir, that we have the right of referendum in this State and surely there is no prohibition in any of the state laws in respect to the right of referendum as reserved in the City Charter of Spokane.

Mr. Schiffner: Well, my position, your Honor, is that pinball machines are outlawed by a specific section of the state law and if our city ordinances or Charter are inconsistent with that, they must give way to the state law and this is preliminary to what I am going to get to on the question of referendum (continues reading).

The Court: Will you please pardon the interruption. Mr. Garvin advised me this morning on my specific request to all of you if there had been any decisions by the lower

courts, Superior Courts, in this state in respect to the legality or illegality of pinball machines. You heard his statement to the effect that Judge Wright or Judge Wilson, which was it?

Mr. Garvin: Judge Wright.

The Court: Judge Wright in the Superior Court has held in two cases, you are unable to furnish me a copy of the opinion?

Mr. Garvin: I have just received it.

The Court: That in his view pinball machines were not illegal and did not contravene criminal statutes relating to them. Now, may I ask you, Mr. Garvin, are those cases on appeal to the Supreme Court?

Mr. Garvin: No, none of them.

The Court: When were they decided?

Mr. Garvin: July 22nd, 1938. Well, the judgment is signed on the 10th day of February, 1941. Maybe this is a different case. Yes, there are two cases.

The Court: Pardon the interruption.

Mr. Garvin: There are two cases, one on February 10th, '41, and one on July 22nd, 1938. Our Supreme Court has never spoken on pinballs.

The Court: I am not interested at this time in these proceedings as to the legality or illegality of pinball machines. If it has been held by other Superior Courts in this State that they are legal in their operation, if that is true it would have very great weight with me.

Mr. Schiffner: Well, it is my position, then, your Honor, and I would like to have the reporter take this, it is our position that the pinball machines, in the operation of the pinball machines as stipulated here, that they are in violation not only of the state law but of the city ordinances. That under the decisions of the courts that no licences or permits issued by the cities would, under the authorities, either legalize these machines or authorize their continued operation and the fact that the machines were taxed does not offer a legal right to their continued operation. I have submitted the brief to your Honor covering those authorities. I do want to read one case on the question of referendum.

The Court: Very well.

POOR COPY

BLEED THROUGH

Mr. Schiffner: And, of course, apparently your Honor doesn't agree with our position but, in any event, you have been kind enough to listen.

The Court: So that you may understand definitely, Mr. Schiffner, I will repeat at this stage of the proceedings in this case I am not interested particularly in the legality or illegality of the operation of pinball machines. Frankly, I have always considered slot machines well-designated when they are called the one-armed bandits but I have thought without any opinion, expressed or otherwise, that the operation of pinball machines was a degree lower in the scale of unlawful operation, only lower than that of the operation of slot machines. And to proceed a little further for your information it is possible that all of the harm and the injury is done and the disruption of homes and the taking of money for grocery purposes, clothing and the sustenance of the family by the pinball machines, such as we all know is done by slot machines. Now, you may proceed.

Mr. Schiffner: Thank you, your Honor. For the purpose of the record I would like to state and for the advice of the Court that you should be further advized that on March 28th, 1949, the City Council did, as alleged in Paragraph V of the petition of plaintiff, pass Ordinance No. C 10078, which definitely prohibits the possession, maintenance and operation of pinball machines and other devices of like character in the City of Spokane. "That a petition was filed by qualified electors sufficient in number to refer the above ordinance to the people at the next municipal election, as provided for in Section 83 of the Charter of the City of Spokane. And that under the Charter provision said Ordinance No. C 10078 is suspended from taking effect until a majority of the qualified electors voting at said election shall vote the said ordinance • • • (continues reading)." That is our position, your Honor. I have one case that I would like to call to the Court's attention, too. It's a very brief case and I should like to read it all.

The Court: Very well.

Mr. Schiffner: The case is Armitage *v.* The City of Camden—135 Atlantic, 660. It is from the Supreme Court of New Jersey and this is the opinion: (reading case).

The Court: Well, Mr. Schiffner, may I ask you one question, please, sir? The City Council by ordinance in this city has legalized the operation of slot machines in clubs, designated clubs, that is true, and, as I understood the opinion of Judge Pettijohn, that is in contravention of the Constitution of the State of Washington relating to gambling, and what is your explanation? And your reason, if any, for the inequity?

Mr. Schiffner: I am not the City Council.

The Court: I know, but you are arguing on their behalf.

Mr. Schiffner: I will say we argued just as vehemently in that case.

The Court: May I interject, you wrote a splendid brief.

Mr. Schiffner: Mr. Farley was prepared to argue the legality of these machines this morning.

The Court: The point is, gentlemen, you can see readily I am not interested in whether the City of Spokane permits the operation of slot machines or pinballs, or both, but the question that is uppermost in my mind is the Charter provisions and the ordinances that have been enacted from time to time and I would suggest to you that somewhere, some time there ought to be some consistency in handling these questions. Now, perhaps, this is the way to get at it but still you would deny the right of the people to pass upon the question of whether they wished the ordinance to be enacted and in effect controlling pinball machines. It appears to me, gentlemen, that there are so many inconsistencies, to speak most mildly, in all of the proceedings and particularly since the opinion of Judge Pettijohn that it comes to the point where it is almost revolting and I am not directing criticism at anyone particularly. It is my understanding from press reports that hundreds of thousands of dollars are contributed for worthy causes by some of the clubs that are permitted to operate. Still this is going rather far afield. I conceive that it is done for the purpose of rather taking the curse off of slot machines.

POOR COPY

BLEED THROUGH

Gentlemen, it is my opinion that the injunction should be continued in force and effect until such time as the city commissioners or city council of Spokane calls an election, either special or regular, to refer the matter or the question to the people of the City of Spokane, and until the final result of that vote there is no determination.

You may prepare exceptions, of course. May I say to you, Mr. Farley and Mr. Schiffner, it is my hope that you take this case to the Supreme Court. If I am reversed I shall be pleased to know what the law is as related by our highest court. If I am affirmed, as I believe I will be, then, there will be justification, at least, to myself for the judgment or opinion that I have rendered in this case. Anything further?

You may adjourn court, Mr. Bailiff.

(Whereupon, court was adjourned until 9:30 a.m. on June 4th, 1949.)

Supreme Court of the United States

October Term, 1949

Office, Supreme Court, U. S.
FILED
FEB 27 1950
CHARLES ELMORE CROPLEY

No. 608

GERALD MILLER and DAVID CAUDILL, for themselves and for the benefit of others similarly situated,
Appellants,

vs.

CITY OF SPOKANE, a municipal corporation; WILLIAM P. PAYNE, Commissioner of Public Safety; E. W. PARSONS, Chief of Police; WILLARD TAFT, KENNETH LAWSON, ARTHUR R. MEEHAW and WALLACE N. SPROUL, City Commissioners, all public officials of the City of Spokane, Washington,
Appellees.

Appeal from the Supreme Court of the State of Washington

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' STATEMENT MAKING AGAINST JURISDICTION OR IN THE ALTERNATIVE APPELLEES' MOTION TO DISMISS OR AFFIRM.

WILMOT W. GARVIN,
605 Columbia Building,
Spokane, 8, Washington
THOMAS I. OAKSHOTT,
Collins Building,
Colville, Washington
JOHN F. GARVIN,
503 Lyon Building,
607 Third Avenue,
Seattle, 4, Washington
CLAUDE L. DAWSON,
917 - 15th St., N. W.,
Washington, 5, D. C.
Attorneys for the Appellants.

POOR COPY

BLEED THROUGH

INDEX AND SUBJECT INDEX

	PAGE
Statement as to Jurisdiction	1
Statutory Provision Sustaining Jurisdiction	2
State Statute Validity of Which is Involved	2
Date of Judgment and Application for Appeal	3
Answer to Appellees' Motion	3
Appellants' Argument	17
Specifications of Assigned Errors to be Urged	16
Statement of the Case	3
Statement of the Grounds of Jurisdiction	10

TABLE OF CASES CITED

Ajax v. Gregory, 177 Wash. 465; 32 Pac. (2) 560	20
American Ry. Express v. Kentucky, 273 U. S. 269; 47 S. Ct. 432; 71 L. Ed. 639	20
Anderson National Bank v. Luckett, 321 U. S. 233; 88 L. Ed. 692	15
Angel v. Bullington, 330 U. S. 183; 91 L. Ed. 832	11, 22, 27
Brennen v. Seattle, 151 Wash. 665; 276 Pac. 886	21
Brown v. Western Railway of Alabama, 94 L. Ed. Ad. Op. 93	27
Charleston Fedl. Sav. & Loan v. Alderson, 324 U. S. 182; 65 S. Ct. 624; 89 L. Ed. 857	19
Christman v. Miller, 197 U. S. 313; 25 S. Ct. 353; 49 L. Ed. 770	19
Craig v. Harney, 331 U. S. 367; 91 L. Ed. 1546	10
Ex rel McCollum v. Board of Education, 333 U. S. 203; 92 L. Ed. 648	10
First National Bank of Garnett v. Ayers, 160 U. S. 660; 16 S. Ct. 412; 40 L. Ed. 573	21

PAGE

Gorman v. Washington University, 316 U. S. 98; 628 S. Ct. 624; 86 L. Ed. 1300 19

Grand River Dam Authority v. Grand-Hydro, 93 L. Ed. Ad. Op. 81 27

Great Northern Ry. v. State, 184 Wash. 648; 62 Pac. (2) 1274 21

Hiawassee River Power Co. v. Carolina Tennessee Power Co., 252 U. S. 341; 64 L. Ed. 601; 40 S. Ct. 330 18

Hulbert v. City of Chicago, 202 U. S. 275; 50 L. Ed. 1026; 26 S. Ct. 617 18

Illinois v. Board of Education, 92 L. Ed. 649; 333 U. S. 203 25

Kinghts of Pythias v. Meyer, 265 U. S. 30; 40 S. Ct. 432; 68 L. Ed. 885 21

Mooney v. Holohan, 294 U. S. 103; 79 L. Ed. 791 22

Oyama v. California, 92 L. Ed. 249; 332 U. S. 632 26

Shelley v. Kraemer, 334 U. S. 1; 92 L. Ed. 1161 25

Smith v. Texas, 85 L. Ed. 84; 61 S. Ct. 164 22

State ex rel Potter v. Maybury, 161 Wash. 142; 296 Pac. 566 21

Terminiello v. Chicago, 93 L. Ed. Ad. Op. 865 10

Treichler v. State of Wisconsin, 94 L. Ed. Ad. Op. 21 10

United States v. Phelan, 92 L. Ed. 1614; 334 U. S. 624 26

Urie v. Thompson, 93 L. Ed. Ad. Op. 927 27

Whitney v. California, 274 U. S. 357; 71 L. Ed. 1095; 47 S. Ct. 641 ..... 18, 19

STATUTES CITED

Constitution of the United States, 14th Amendment 12, 14, 15, 17

United States Code:

Title 28, Sec. 1257(2) 2

POOR COPY

BLEED THROUGH

PAGE

Constitution of the State of Washington

Article 11, Section 10 2

WASHINGTON STATUTES

Remington's Revised Statutes

Section 2472 ..... 2, 9
Section 2472-1 ..... 2, 9
Section 2472-2 ..... 2, 9
Section 8370-96 2
Section 8370-100 2

CITY CHARTER PROVISIONS

Article IX, Section 83 2
Article III, Section 12 2
Article III, Section 13 2
Article III, Section 10 2

CITY ORDINANCES

Ordinance C 10078 4
Ordinance C 9441 5
Ordinance A 1250 7
Ordinance C 8178 8

(b)

Reference to the official report of the opinion of the Court Gerald Miller, et al. v. City of Spokane, 134 Wash. Dec. Ad. Op. 104 14

POOR COPY

BLEED THROUGH

Supreme Court of the United States

October Term, 1949

No. 608

GERALD MILLER and DAVID CAUDILL, for themselves and for the benefit of others similarly situated,
Appellants,

vs.

CITY OF SPOKANE, a municipal corporation; WILLIAM P. PAYNE, Commissioner of Public Safety; E. W. PARSONS, Chief of Police; WILLARD TAFT, KENNETH LAWSON, ARTHUR R. MEEHAW and WALLACE N. SPROUL, City Commissioners, all public officials of the City of Spokane, Washington,
Appellees.

Appeal from the Supreme Court of the State of Washington

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' STATEMENT MAKING AGAINST JURISDICTION OR IN THE ALTERNATIVE APPELLEES' MOTION TO DISMISS OR AFFIRM.

STATEMENT OF THE CASE AND GROUNDS OF JURISDICTION

(c) This is an appeal to the Supreme Court of the United States from a final judgment of the Supreme Court of the State of Washington, reversing a judgment of the

Superior Court of Spokane County, Washington, directing the issuance of a permanent injunction against the defendants from arresting or molesting plaintiffs and others similarly situated by virtue of having in their possession and operating pinball machines in the City of Spokane, Washington, and from seizing, confiscating and destroying such machines, and that such injunction shall remain in full force and effect until the electors of the City of Spokane shall have had an opportunity to exercise the right of referendum by a vote for or against the continued operation of pinball machines within the City of Spokane, Washington.

The City of Spokane, Washington, appealed from the judgment of the lower court, and the State Supreme Court reversed the trial court's decision and upheld the validity of Remington's Revised Statute 2472, Laws of 1909, Section 220, page 955, defining gambling devices, and decreeing that pinball machines were gambling devices within the above statute. The federal statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section 1257 clause (2), Title 28, of the United States Code.

The statutes of the State of Washington or the city ordinances and charter provisions of the City of Spokane, Washington, together with portions of the Constitution, the validity of which is involved, so far as pertinent to this appeal, are: Article 11, Section 10 of the Constitution of the State of Washington; Section 83, Article IX, page 6 of the Charter and General Ordinances of the City of Spokane; Sections 12 and 13, Article III, page 1 of the Charter and General Ordinances of the City of Spokane; Section 10, Article III, page 1 of the Charter and General Ordinances of the City of Spokane; Remington's Revised Statute, Sec. 2472; Remington's Revised Statute, Sec. 2472-1, Laws of 1937; Remington's Revised Statute, 2472-2, Laws of 1937; Remington's Revised Statute, Section 8370-96, Laws of 1941; Remington's Revised Statute 8370-100,

POOR COPY

BLEED THROUGH

Laws of 1941, more specifically as set out heretofore by the appellants in their statement as to jurisdiction in the record 105, 106, 107, 108 and 109.

(d) A concise statement of the case is as follows:

The date of the judgment of the Supreme Court of the State of Washington sought to be reviewed is December 15, 1949, and the date upon which the application for appeal was presented is the 7th day of January, 1950.

The plaintiffs and respondents were owners and operators of pinball machines within the City of Spokane, Washington, and on March 28, 1949 the City Council passed an ordinance, C 10078, prohibiting the possession and operation of pinball machines, and repealing previous ordinances which authorized the operation and possession of pinball machines; and licensing, taxing, regulating and providing for the conduct, inspection and operation of the machines. (R. 83-84)

Prior to the effective date of Ordinance No. C 10078, a referendum petition satisfying the charter requirements was duly and regularly filed and a proper certification was affixed by the City Clerk, whereupon on May 13, 1949, the City Commissioners and Council reconsidered Ordinance No. C 10078 in order that said ordinance be submitted to a popular vote at the next municipal election. (R. 83-84) At the same date of the order referring the passage of the ordinance in question to a popular vote at the next municipal election, the City Council, by resolution, notified the owners of the pinball machines that all persons having machines in their possession after May 23, 1949 would be arrested. (R. 84)

Plaintiffs immediately sought the aid of the courts of equity in the Superior Court of the State of Washington in and for the County of Spokane, and sought and obtained an injunction against the defendants, prohibiting them from arresting the plaintiffs and others similarly situated,

and further enjoining the defendants from interfering with the operation of the machines or from their confiscation. (R. 83)

Ordinance No. C 10078 reads as follows:

"ORDINANCE NO. C 10078

An ordinance prohibiting the possession, maintenance, conduct, operation or use of pinball machines or other devices of like character for rewards, excepting slot machines in private clubs, wherein there enters an element of chance; providing penalties for the violation thereof; and repealing Ordinance No. C 9441, passed the City Council December 29, 1947.

The City of Spokane does ordain:

Section 1. Any person, firm or corporation who shall have in his or its possession or who shall conduct, maintain, operate or use, either as owner or owners, proprietor or proprietors, lessee or lessees, employee or employees, agent or agents, any pinball machine or any other automatic or mechanical device of like character, other than slot machines in private clubs as provided by Ordinance No. C 10077, wherein there enters an element of chance, whether the same be played or operated for money, checks, credits or any other thing or representative of value, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine in any sum not exceeding Three Hundred Dollars ($300) or by imprisonment in the city jail for a period not exceeding ninety (90) days, or by both such fine and imprisonment.

Section 2. That Ordinance No. C 9441, passed the City Council December 29, 1947, and entitled, 'An ordinance relating to public morality and good order in the City of Spokane, prohibiting the playing of pinball machines and devices of like character by persons under the age of twenty-one years, requiring the approval of premises where such machines are located, providing penalties for the violation thereof, and repealing Ordinance No. A 1250, passed the City Council November 11, 1902, and Ordinance No. C 8178, passed the City Council April 23, 1945,' be, and the same is hereby repealed.

POOR COPY

BLEED THROUGH

Section 3. This ordinance shall take effect and be in force thirty (30) days from and after its passage.

Passed the City Council March 28, 1949.

ARTHUR R. MEEHAN
Mayor

Attest: Alex Brown
City Clerk

Approved as to form:

.....
Corporation Counsel "

and it is upon this Ordinance that the referendum became effective. This Ordinance sought to repeal Ordinances C 9441, Ordinance No. A 1250 and Ordinance No. C 8178.

These ordinances read respectively as follows:

"ORDINANCE NO. C 9441 (by Payne)

An ordinance relating to public morality and good order in the City of Spokane, prohibiting the playing of pinball machines and devices of like character by persons under the age of twenty-one years, requiring the approval of premises where such machines are located, providing penalties for the violation thereof, and repealing Ordinance No. A 1250, passed the city council November 11, 1902, and Ordinance No. C 8178, passed the city council April 23, 1945.

The City of Spokane does ordain:

Section 1. It shall be unlawful for any person, firm or corporation who conducts, maintains, or operates, either as owner or owners, proprietor or proprietors, lessee or lessees, employee or employees, agent or agents, any pinball machine or any other automatic or mechanical device of like character which may be played or operated for money, checks, credits, rewards or any other thing or representative of value to permit or allow any person under the age of twenty-one years to play or operate the same.

Section 2. It shall be unlawful for any person under the age of twenty-one years to play or operate any pinball machine or any other automatic or mechanical

device of like character which may be played or operated for money, checks, credits, rewards or any other thing or representative of value.

Section 3. It shall be unlawful for any person, firm or corporation to place any pinball machine or any other device of like character in any premises, the location of which has not been first approved by the commissioner of public safety.

Section 4. The commissioner of public safety shall make such rules and regulations as may be necessary to carry into effect the provisions of this ordinance and for its proper operation, which rules and regulations shall be filed with the city clerk and when so filed shall have the force and effect of law.

Section 5. The commissioner of public safety may suspend or revoke any location approval at any time when in his opinion the further operation of pinball machines or other devices of like character in operation at a particular location would be detrimental to the public peace or morals, or for the violation of any of the provisions of this ordinance or of any rule or regulation promulgated thereunder. The commissioner of public safety shall cause to be served upon the person who is in charge of any approved location and upon such parties as he may deem to be interested therein such reasonable notice as he may determine to be proper of his intention to suspend or revoke his location approval. There shall be included or attached to such notice a statement of the facts constituting the violation charged. Within three days after receipt thereof, such parties shall be entitled to a hearing before the commissioner of public safety. The action of the commissioner of public safety shall be conclusive and not subject to review. It shall be unlawful for any person, firm or corporation whose location approval has been suspended or revoked as herein provided to operate any pinball machine or device of like character at said location during the period of suspension or after revocation.

Section 6. Any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and, upon conviction thereof,

POOR COPY

shall be punished by a fine in any sum not exceeding Three Hundred Dollars ($300.00), or by imprisonment in the city jail for a period not exceeding ninety (90) days, or by both such fine and imprisonment.

Section 7. That Ordinance No. A 1250, passed the city council November 11, 1902, and entitled, 'An ordinance to prohibit the maintaining, conducting, operating or using automatic nickel-in-the-slot machines, or other devices of like character, wherein there enters an element of chance,' be, and the same is hereby, repealed.

Section 8. That Ordiance No. C 8178, passed the city council April 23, 1945, and entitled, 'An ordinance relating to public morality and good order in the City of Spokane, prohibiting the playing of pinball machines and devices of like character by persons under the age of twenty-one years, providing penalties for the violation thereof, and declaring an emergency,' be, and the same is hereby, repealed.

Section 9. This ordinance shall take effect and be in force thirty days from and after its passage.
Passed the city council December 29, 1947.

ARTHUR MEEHAN, Mayor

Attest: A. A. BROWN, City Clerk "

SLOT MACHINES

ORDINANCE NO. A 1250

An ordinance to prohibit the maintaining, conducting, operating or using automatic nickel-in-the-slot machines, or other devices of like character, wherein there enters an element of chance.

The City of Spokane does ordain as follows:

Section 1. Any person or persons who shall conduct, maintain or operate, either as owner or owners, proprietor or proprietors, lessee or lessees, employee or employees, agent or agents, any automatic nickel-in-the-slot machine, or other device of like character, wherein there enters an element of chance, whether the same be played or operated for money, checks, credits,

or any other thing or representative of value redeemable in money, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than ten dollars nor more than one hundred dollars, and in default of the payment of the fine imposed shall be imprisoned in the city jail one day for each two dollars thereof.

Section 2. For the purposes of trial and conviction under this ordinance, the possession of any such machine or device that automatically pays money, or checks, or slugs, and commonly known as a cash machine, or keeping the same in any place accessible to the public, shall be prima facie evidence against the person in possession thereof of guilt under this ordinance.

Section 3. This ordinance shall take effect and be in force ten days after its passage.

Passed the city council November 11, 1902. "

ORDINANCE NO. C 8178 (By Colburn)

An ordinance relating to public morality and good order in the City of Spokane, prohibiting the playing of pinball machines and devices of like character by persons under the age of twenty-one years, providing penalties for the violation thereof, and declaring an emergency.

The City of Spokane does ordain:

Section 1. It shall be unlawful for any person, firm or corporation who conducts, maintains or operates, either as owner or owners, proprietor or proprietors, lessee or lessees, employe or employees, agent or agents, any pinball machine, or any other automatic or mechanical device of like character which may be played or operated for money, checks, credits, rewards or any other thing or representative of value to permit or allow any person under the age of twenty-one years to play or operate the same.

Section 2. It shall be unlawful for any person under the age of twenty-one years to play or operate any pinball machine or any other automatic or mechanical

POOR COPY
BLEED THROUGH

device of like character which may be played or operated for money, checks, credits, rewards or any other thing or representative of value.

Section 3. Any person, firm or corporation violating any of the provisions of this ordinance, upon conviction thereof, shall be punished by a fine of not more than $300, or by imprisonment in the city jail for a period not exceeding ninety (90) days, or by both such fine and imprisonment.

Section 4. An urgency and emergency for the passage of this ordinance is hereby declared to, and does, exist, and the same shall take effect and be in force immediately upon its passage.

Passed the city council April 23, 1945.

F. G. SUTHERLIN, Mayor.

Attest: W. N. SPROUL, City Clerk"

The Supreme Court reversed the trial court on the grounds and for the reason that a pinball machine is a gambling device within the definition of Remington's Revised Statute 2472, Laws of 1909, and that neither the City Commissioners nor the people of the city have the power to enact an ordinance in conflict with a general law of the state. (R. 88)

The Supreme Court of the State of Washington assumed that at the municipal election Ordinance No. C 10078 would be defeated and would in effect legalize the operation of pinball machines. The Supreme Court was silent, however, on the right of the people to vote the machines out or make them unlawful under their referendum privileges as provided by the State Constitution and the Charter of the City of Spokane. The Supreme Court likewise held that Remington's Revised Statute 2472 was not repealed by Remington's Revised Statutes 2472-1, Laws of 1937, and Remington's Revised Statute 2472-2, Laws of 1937. The Court, however, was silent as to whether or not Remington's Revised Statute 2472 was not in fact repealed by Section

8370-100, Laws of 1941 Supplement, Remington's Revised Statutes.

The ruling of the trial court was such as to bring the case within the jurisdictional provisions heretofore relied on, in that the trial court held that the plaintiffs should be allowed to operate their lawful business until such time as the question was submitted to the electorate, and to deprive them of that right prior to the election would constitute an unlawful deprivation of plaintiffs' right to enjoy the use and possession of their property without due process of law, or without any process of law whatsoever. The ruling of the Supreme Court reversing the trial court's decision was such as to bring it within the jurisdictional provisions heretofore relied on, in that the Supreme Court of the State of Washington held that by virtue of Remington's Revised Statute 2472, Laws of 1909, prohibited plaintiffs from operating, and such prohibition by virtue of that statute was in fact due process of law.

The cases believed to sustain the jurisdiction of the United States Supreme Court are:

Craig v. *Harney*, 331 U. S. 367; 91 Law Edition 1546, p. 1551;

Ex rel McCollum v. *Board of Education*, 333 U. S. 203; 92 Law Edition, 648;

Treichler v. *State of Wisconsin*, Volume 94 Law Edition; Advance Opinions No. 1, p. 21.

Terminiello v. *Chicago*, Vol. 93 Supreme Court Law Edition, Advance Opinions p. 865, at p. 868.

"Here claims based on the United States Constitution were plainly and reasonably made in the North Carolina suit. The North Carolina Supreme Court met these claims. It met them by saying that the North Carolina statute did not deal with substantive matters but merely with matters regulating local procedure, but whether claims are based upon a federal right or merely of local concern *is itself a federal question* on which this court and not the Supreme Court of North Carolina has the last say. That court could not put a

POOR COPY

BLEED THROUGH

> federal claim aside as though it were not in litigation by the talismanic word 'jurisdiction'. When an asserted federal right is denied the sufficiency of the grounds of denial is for this court to decide. Bullington could have come here not merely by the grace of this court on certiorari but on appeal."
>
> *Angel* v. *Bullington*, 330 U. S. 183, p. 188, 189
> 91 Law Ed. 832, p. 836

This appeal being from a state court, the grounds upon which it is contended that the questions involved are substantial is that the federal question sought to be reviewed was first raised in the trial court by virtue of pleadings in the Petition for Injunction. Paragraph XIV of plaintiffs' Petition for an Injunction reads as follows:

> "That the threatened arbitrary, inequitable, unlawful, and fraudulent action of the defendants in seizing and confiscating pinball machines which belong to the plaintiffs, and in arresting the plaintiffs, is a direct invasion and abridgement of plaintiffs' property rights as defined by the Fourteenth Amendment to the Constitution of the United States, in that said action on defendants' part constitutes and will constitute unlawful deprivation of plaintiffs' right to enjoy the use and possession of their property without due process of law or without any process of law whatsoever, and is a direct violation of Sections 3 and 12 of Article I of the Constitution of the State of Washington, in that said acts will deprive the plaintiffs of liberty and property without due process of law."

That the threatened arbitrary, inequitable, unlawful and fraudulent action of the defendants in seizing and confiscating pinball machines which belong to the plaintiffs and arresting the plaintiffs is a direct invasion and abridgement of plaintiffs' property rights as defined by the Fourteenth Amendment to the Constitution of the United States, in that said action on defendants' part constitutes and will constitute unlawful deprivation of plaintiffs' right to enjoy the use and possession of their property without due process of law, or without any process of law whatsoever. (R. 7)

The trial court held that the action of the City Council in effect deprived plaintiffs of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. (R. 38 to 54)

Quoting from Transcript of Proceedings, page 3, as follows:

> "You will observe, gentlemen, that the City Council, which is your legislative body, evidently took no action whatever upon the petition for referendum which had been certified by the City Clerk as having the required number of names to take the question of the enactment of the ordinances relating to pinball machines to a vote of the people of this city. It is not alleged that it was so ordered." (R. 40)

Quoting from Transcript of Proceedings, pp. 5 and 6.

> "
> . . . .
> "THE COURT: Yes, very well. I beg your pardon, Mr. Farley, you are quite correct. However, it will be stipulated that the City Council on the 13th day of May, 1949, moved and passed the resolution which I have just read, that is true, isn't it, or correct?
> "MR. FARLEY: Yes.
> "THE COURT: Now, the question of the legality or illegality of pinball machines will not be passed on at this time by me. I take it that the crux of this entire proceeding is whether or not the people of the City of Spokane shall be given the right to vote as provided in Section 83 of the Charter on referendum. Personally, I am very much in favor of referring questions to the people for their ultimate determination. It is an admitted fact that the advisory ballot taken on the question of the operation of slot machines and pinball machines at the recent election was merely advisory. Why it was done in that manner I do not know. You can draw your own inferences. Every legislative body has an inherent duty to act and perform their duties in a manner that is required under the law and the ordinance in the instant case of the City of Spokane. If I am wrong in my conclusion that the people of the city shall have a right

POOR COPY
BLEED THROUGH

to pass upon the question of the adoption of the ordinance in question the Supreme Court of this State will be very happy to correct my error and I hope that this case is taken to the Supreme Court for determination of the right of referendum on this question." (R. 6-7)

Quoting from Transcript of Proceedings, pp. 9 and 10.

"THE COURT: There has been no determination of that question. Then, as I understand you, Mr. Losey, you would deprive the people of the right to pass upon this ordinance notwithstanding Section 83 of the City Charter, adopted by the people many years ago, relating to the referendums.

". . .

"THE COURT: No, I thought it was understood, Mr. Farley, that from my views expressed to all of you, that the people, in my opinion, were entitled to the right of referendum on this question; that compliance had been made by ten percent or more of the total vote cast at the last election; that that vote had been certified by the City Clerk and that is merely a question of whether the people should be denied the right and privilege that they have reserved to themselves in their Charter and that I was of the view that they should not be." (R. 45-46)

Quoting from Transcript of Proceedings, pp. 14 and 15.

"THE COURT: Well, I think there is no question about that, no question at all, Mr. Schiffner. Let me point out to you, if you please, sir, that we have the right of referendum in this state and surely there is no prohibition in any of the state laws in respect to the right of referendum as reserved in the City Charter of Spokane." (R. 49-50)

Quoting from pp. 19 and 20, Transcript of Proceedings.

"THE COURT: . . .
Now, perhaps, this is the way to get at it but still you would deny the right of the people to pass upon the question of whether they wished the ordinance to be enacted and in effect controlling pinball machines.

". . .

"Gentlemen, it is my opinion that the injunction should be continued in force and effect until such time as the

> city commissioners or city council of Spokane calls an election, either special or regular, to refer the matter or the question to the people of the City of Spokane, and until the final result of that vote there is no determination." (R. 53-54)

The State Supreme Court did not pass upon or discuss the federal constitutional question involved under the due process clause of the Fourteenth Amendment to the Constitution other than by inference where it states:

> "The argument has been made that, in the interest of local self-government, the ordinance should be submitted to the people of Spokane for their approval or rejection. The contention would be unanswerable were it not for the constitutional provision contained in Art. XI, Sec. 10, and our laws as passed by the legislature. All acts of the people and their representatives, regardless of the virtue of those acts, must yield to the provisions of our constitution." (R. 88)

It will be observed that under this language and the construction of the state statutes involved in this case, as well as the ordinances and portions of the state constitution, that the people are refused the privilege of enacting a local ordinance the same or similar to an existing state law. The State Supreme Court assumes that the people of Spokane would, if an election were called, legalize the operation of pinball machines. They fail to take into consideration that at the election to be called they, by their vote, might make the operation of pinball machines within the City of Spokane unlawful, the same as the state law is claimed to do by the Supreme Court. In any event, the Supreme Court is in error in assuming that the citizens of Spokane would endeavor to legalize the operation of pinball machines, for such an assumption is assuming facts not in existence, not in the record, wholly conjectural and imaginary, and by that assumption the Supreme Court of the state has in fact placed a prohibition upon the right of referendum within the State of Washington.

POOR COPY

It is respectfully called to the Court's attention that in addition to the reasons heretofore cited, as violating the due process clause of the Fourteenth Amendment of the Constitution of the United States, the Supreme Court of the State of Washington in fact found a violation of the criminal statute, in an equity proceedings by "judicial notice" rather than upon any evidence in the record. Such a finding or judgment is in fact a violation of the due process clause as tested and laid down by this Court in the case of *Anderson National Bank* v. *Luckett*, 321 U. S. 233, p. 246; 88 Law Ed. 692, p. 704, when this Court stated:

> "What is due process . . . must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceedings appropriate to the nature of the case . . . The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the rights for which constitutional protection is invoked."

The State Supreme Court by virtue of its decision held in effect that the appellants have violated the criminal statute and are guilty of a crime without allowing appellants the right to defend themselves, all of which was done in an equity proceeding (R. 88). It was specifically requested by the appellants that in the event the State Supreme Court should reverse the case, then in that event the cause be remanded to the trial court to take additional testimony to establish whether or not pinball machines were "in fact" in violation of Remington's Revised Statutes 2472, but such request was denied by the state court. (R. 88) The decisions of the state are uniform in holding that a court of equity in an injunction proceedings is limited to the function of establishing whether or not the statute or ordinance is valid or invalid and may not inquire into the question of fact whether in fact a crime has been committed, such question of fact being limited to the forum of a criminal prosecution.

SPECIFICATIONS OF ASSIGNED ERRORS

(e) A specification of the assigned errors that are intended to be urged are as follows:

I.

That the Supreme Court of the State of Washington erred as a matter of law in holding that the citizens of the City of Spokane, Washington, did not have the right to exercise the privilege of referendum as granted by the Constitution of the State of Washington, Article 11, Section X, as well as Section 83, Article IX of the Charter of the City of Spokane, and Sections 12 and 13 of Article III of the City Charter of Spokane, and such error of law being in fact a violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

II.

That the Supreme Court of the State of Washington erred as a matter of law in concluding that Remington's Revised Statute 2472, being the Laws of 1909, were not in fact superseded and repealed by Remington's Revised Statutes 2472-1 and 2472-2, the Laws of 1937, as well as Remington's Revised Statute 8370-100, being the Laws of 1941, and that such fact constitutes a violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

III.

That the Supreme Court of the State of Washington erred as a matter of law when the court sitting in equity, with its sole province being limited to the consideration of the validity or invalidity of a state statute, arbitrarily ruled upon a question of fact not before the Court, and the decision of which question of fact was solely a proper function of a jury considering a claimed violation of the statute

POOR COPY
BLEED THROUGH

under consideration, and such fact constitutes a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

IV.

The Supreme Court of the State of Washington erred as a matter of law in failing to dismiss the appeal of the City of Spokane in accordance with plaintiffs' and petitioners' motion, and that such failure to dismiss the appeal of the City of Spokane constitutes a violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

V.

For errors apparent of record.

ARGUMENT

Inasmuch as this brief is limited in its province to argument in opposition to appellees' statement making against the jurisdiction of this Court or in the alternative a motion to dismiss or affirm, and strictly speaking is not a brief on the merits as contemplated by Rule 27, the argument at this time will be limited to (a) a consideration of appellees' authorities submitted in its motion to dismiss or affirm, and (b) reiterating appellants' position as to the sufficiency of appellants' statement as to jurisdiction.

Taking up the first allegations as contained in appellees' motion and referring specifically to paragraph 1 therein, it is submitted that appellants' affidavit (R. 152, 153), in relation to the subject matter, is a sufficient answer to the matter therein contained. In any event, appellees are not prejudiced in that when the purported missing matter was called to appellants' attention duplicate copies were served upon appellees. Paragraphs 2, 3, 4, 5, 6, 7 and 8 are subse-

quently covered in appellants' argument as contained in this brief.

(a) In the case of *Hiawassee River Power Co.* v. *Carolina Tennessee Power Co.*, 252 U. S. 341; 64 Law Ed. 601; 40 Sup. Ct. 330, the right under the federal constitution was not necessarily involved and objection as to the admissibility of certain evidence was directed to the state constitution rather than to the federal constitution. Likewise, there was no reference made to the violation of any portion of the Fourteenth Amendment. In the case at bar a substantial federal question was specifically raised in appellants' pleadings in the first instance in the original petition (R. 6), and such federal question was specifically passed upon by the trial court (R. 38 to 54), and likewise passed upon by the state supreme court (R. 88).

In the case of *Hulbert* v. *City of Chicago*, 202 U. S. 275, 50 L. Ed. 1026, 26 S. Ct. 617, it specifically shows that in the bill of exceptions plaintiff in error did not bring to the attention of the trial court that any of the proceedings were contrary to the Fourteenth Amendment to the Consitution of the United States, and therefore that there was no federal question either before the trial court or the state supreme court. It is not apparent to the appellants how this case is of any assistance to the appellees in their motion to dismiss or affirm.

Neither is it seen how the case of *Whitney* v. *California*, 274 U. S. 357; 71 Law Ed. 1095; 47 S. Ct. 641, is of any assistance to the appellees. However, it is interesting to note the following language of the opinion:

> "And here, since it appears from the statement in the order of the court of appeal that the question whether the Syndicalism Act and its application in this case was repugnant to the due process and equal protection clauses of the 14th Amendment, was considered and passed upon by that court,—this being a Federal question constituting an appropriate ground

POOR COPY

BLEED THROUGH

> for a review of the judgment,—we conclude that this court has acquired jurisdiction under the writ of error."
> *Whitney* v. *Cal.* 274 U. S. 357; 71 L. Ed. 1095; 47 S. Ct. 641.

Likewise in the case of *Charleston Federal Savings & Loan* v. *Alderson*, 324 U. S. 182; 65 S. Ct. 624; 89 Law Ed. 857, we do not see how this case is helpful to appellees in their motion inasmuch as this court did decide the case on its merits. It is true that the appeal was dismissed but the court took jurisdiction by virtue of writ of certiorari as provided in the statute, and again the language of the court in this case appears to fortify appellants' position that this court has jurisdiction, when this court stated in the Charleston case:

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court.
> *Charleston Fed. Sav. & Loan* v. *Alderson*, 324 U. S. 182; 65 S. Ct. 624; 89 L. Ed. 857, p. 861

The case of *Gorman* v. *Washington University*, 316 U. S. 98; 62 S. Ct. 624; 86 L. Ed. 1300, is not at all in point or analogous to the situation in the case at bar. It was conceded as shown by the record that the decision of the lower court was not a decision of the highest court of the state of which a decision could be had. In other words, appellants in that case did not exhaust their remedies in the lower court. There is no such question raised, intimated or inferred by the appellees that such is the situation of the present case.

Re the case of *Christman* v. *Miller*, 197 U. S. 313; 25 S. Ct. 353; 49 L. Ed. 770, it is submitted to this court that the above cited case is in no manner analogous to the situation

of the case at bar. The only statement that is made in the *Christman* case is that the United States Supreme Court will not review questions of fact of the state supreme court but accepts the conclusions of the state tribunal as final. It is not seen by appellants how this case in any manner can assist as an authority one way or another in settling the question as to whether this court has jurisdiction in the case at bar.

Neither is the case of *American Ry. Express Co.* v. *Commonwealth of Kentucky*, 273 U. S. 269; 47 S. Ct. 432; 71 L. Ed. 639, in any manner analogous to the case at bar in that the *American Ry. Express* v. *Kentucky* case comes before the court on a writ of certiorari and not on appeal. It is interesting, however, to note that this court does state in the *Railway Express* case:

> "Save in exceptional circumstances not now present we must accept as controlling the decision of the state courts upon questions of local law."
>
> *American Ry. Express* v. *Kentucky*, 273 U. S. 269; 47 S. Ct. 432; 71 L. Ed. 639

Applying the above principle of this court to the present appeal as previously pointed out in appellants' assignments of errors (assignment 3, R. 95) it seems that the state supreme court specifically violated the due process clause of the Fourteenth Amendment by finding a criminal violation of a statute through judicial notice in an equity proceedings in which appellants had no right to defend themselves and when such inquiry should have been confined to whether or not the statute in question was valid or invalid and not decide by judicial notice a question of fact that a crime is or was committed.

The state decisions holding the above statement to be a law are unanimous and without a single contradiction, as set out in the following cases:

Ajax v. *Gregory*, 177 Wash. 465, at p. 476; 32 Pac. (2) 560

Great Northern Ry. v. *State*, 184 Wash. 648 at p. 652; 62 Pac. (2) 1274

State ex rel Potter v. *Maybury*, 161 Wash. 142 at p. 149; 296 Pac. 566

Brennen v. *Seattle*, 151 Wash. 665 at p. 668; 276 Pac. 886

Referring again to the authoritative weight of *American Railway Express Company* v. *Kentucky* and the language therein cited, when it states:

> "This court will interfere where there is a clear conflict with fundamental principles which have been established in our system of jurisprudence, for the protection and enforcement of private rights."
> *American Ry. Express* v. *Kentucky*, 71 Law Ed. 639 at p. 641; 273 U. S. at p. 273

In the case of *Knights of Pythias* v. *Meyer*, as cited by appellees to sustain their position and reported in 265 U. S. 30; 40 S. Ct. 432; 68 Law Ed. 885, it is to be noted that this case was heard by this court on the merits. It is true that the application to this court was by writ of error and that the court in fact heard it on writ of certiorari rather than a writ of error. This was due not by virtue of the fact that the court did not have jurisdiction but rather it was heard on a writ of certiorari only because there was a change of federal procedure law which this court interpreted that the matter was more properly before it on certiorari than on appeal.

In the case of *First National Bank of Garnett* v. *Ayers*, 160 U. S. 660; 16 S. Ct. 412; 40 L. Ed. 573, it is contended that this case is not at all appropriate to the question before the court on appellees' motion in that no question as to jurisdiction is anywhere discussed in the decision.

(b) Appellants' statement as to jurisdiction (R. 102-120) and authorities therein cited reiterate the previous decisions of this court why the case at bar should be heard

by the court on appeal. In addition to the authorities previously submitted in appellants' statement as to jurisdiction, which are incorporated in and made a part of this brief by reference, appellants submit the following authorities why this court has jurisdiction and should hear this case and that appellants as a matter of right are entitled to have the case heard under the doctrine of *Angel* v. *Bullington*, 330 U. S. 183; 91 Law Ed. 832.

> "Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. . . . It is a requirement that cannot be deemed to be satisfied by mere notice and hearing . . . which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception. . . . Such a contrivance . . . is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of . . . administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That amendment governs any action of a state, whether through its legislature, *through its courts*, or through its *executive or administrative officers.*"
>
> *Mooney* v. *Holohan*, 294 U. S. 103; 79 Law Ed. 791 p. 794
>
> *Smith* v. *Texas*, 85 Law Ed. 84; 61 S. Ct. 164
>
> "That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the state within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment. Thus, in Virginia v. Rives, 100 U. S. 313, 318, 25 L. Ed. 667, 669 (1880), this court stated: 'It is doubtless true that a State may act through different agen-

POOR COPY

BLEED THROUGH

cies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the state denying equal protection of the laws, whether it be action by one of these agencies or by another.' In Ex Parte Virginia, 100 U. S. 339, 347, 25 L. Ed. 676, 679 (1880), the Court observed: 'A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way.' In the Civil Rights Cases, 109 U. S. 3, 11, 17, 27 L. Ed. 835, 839, 841 (1883) this Court pointed out that the Amendment makes void 'State action of every kind' which is inconsistent with the guaranties therein contained, and extends to manifestations of 'State authority in the shape of laws, customs, or judicial or executive proceedings.' Language to like effect is employed no less than eighteen times during the course of that opinion.

Similar expressions, giving specific recognition to the fact that judicial action is to be regarded as action of the State for the purposes of the Fourteenth Amendment, are to be found in numerous cases which have been more recently decided. In Twining v. New Jersey, 211 U. S. 78, 90, 91, 53 L. Ed. 97, 102, 103, 29 S. Ct. 14 (1908), the Court said: 'The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State.' In Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 680, 74 L. Ed. 1107, 1113 (1930), the Court, through Mr. Justice Brandeis, stated: 'The Federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government.' Further examples of such declarations in the opinions of this Court are not lacking.

One of the earliest applications of the prohibitions contained in the Fourteenth Amendment to action of state judicial officials occurred in cases in which Negroes had been excluded from jury service in criminal prosecutions by reason of their race or color. These cases demonstrate, also, the early recognition by this Court that state action in violation of the Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or taken

by a judicial official in the absence of statute. Thus, in Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664 (1880), this Court declared invalid a state statute restricting jury service to white persons as amounting to a denial of the equal protection of the laws to the colored defendant in that case. In the same volume of the reports, the Court in Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676, supra, held that a similar discrimination imposed by the action of a state judge denied rights protected by the Amendment, despite the fact that the language of the state statute relating to jury service contained no such restrictions.

The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment. Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107 supra. Cf. Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 (1878).

In numerous cases, this Court has reversed criminal convictions in state courts for failure of those courts to provide the essential ingredients of a fair hearing. Thus it has been held that convictions obtained in state courts under the domination of a mob are void. Moore v. Dempsey, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265 (1923). And see Frank v. Mangum, 237 U. S. 309, 59 L. Ed. 969, 35 S. Ct. 582 (1915). Convictions obtained by coerced confessions, by the use of perjured testimony known by the prosecution to be such, or without the effective assistance of counsel, have also been held to be exertions of state authority in conflict with the fundamental rights protected by the Fourteenth Amendment.

But the examples of state judicial action which have been held by this Court to violate the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may

POOR COPY
BLEED THROUGH

result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process. Thus, in American Federation of Labor v. Swing, 312 U. S. 231, 85 L. Ed. 855, 61 S. Ct. 568 (1941), enforcement by state courts of the common-law policy of the state, which resulted in the restraining of peaceful picketing, was held to be state action of the sort prohibited by the Amendment's guaranties of freedom of discussion. In Cantwell v. Connecticut, 310 U. S. 296, 84 L. Ed. 1213, 60 S. Ct. 900, 128 ALR 1352 (1940), a conviction in a state court of the common-law crime of breach of the peace was, under the circumstances of the case, found to be a violation of the Amendment's commands relating to freedom of religion. In Bridges v. California, 314 U. S. 262, 86 L. Ed. 192, 62 S. Ct. 190, 159 ALR 1346 (1941), enforcement of the state's common-law rule relating to contempts by publication was held to be state action inconsistent with the prohibitions of the Fourteenth Amendment. And cf. Chicago, B. & Q. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897).

The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government. *Shelley* v. *Kraemer*, 334 U. S. 1; 92 L. Ed. 1161, p. 1181, 1182, 1183

In the case of *Illinois* v. *Board of Education*, 92 Law Ed. 649; 333 U. S. 203, a motion there as here was made by the appellees to dismiss the appeal on the ground that there

was no jurisdiction, and this Court, speaking in that regard, stated:

> "But the State Supreme Court has sustained the validity of the program on the ground that the Illinois statutes granted the board authority to establish such a program. This holding is sufficient to show that the validity of an Illinois statute was drawn in question within the meaning of 28 USCA Sec. 344(a)."

We respectfully submit to this Court that the above cited case is practically on all fours with the case at bar, that the language used in *Illinois* v. *Board of Education* can be lifted from that decision and applied specifically to this case.

In approaching cases such as this (violation of the Fourteenth Amendment) in which federal constitutional rights are asserted, it is incumbent upon us to inquire not merely whether those rights have been denied in express terms but whether they have been denied in *substance and effect.* We must review independently both the legal issues and those factual matters with which they are comingled.

Oyama v. *California*, 92 L. Ed. 249, p. 254, 332 U. S. 632 at p. 636
U. S. v. *Phelan*, 92 Law Ed. 1614, p. 1626, 334 U. S. 624, p. 640

For the sake of argument, conceding but not admitting appellees' position that since the State Supreme Court was silent as to the violation of the Fourteenth Amendment, then by virtue of such silence this Court is foreclosed from considering alleged violations as specifically set out in appellants' pleadings, which alleged violations were found to occur by the trial court. In other words, if the state court should by its silence ignore the federal question specifically pleaded, relied upon and considered by the trial court, would such silence constitute a bar to appellants

POOR COPY
BLEED THROUGH

here because the federal question was not discussed by the State Supreme Court at such length as appellees think necessary and in such detail as likewise thought necessary? Such is not the rule of this Court and may it never be the rule that a State Supreme Court bind and shackle the hands of this Court by virtue of its silence.

> "Local rules of practice cannot bar this Court's independent consideration of all substantial federal questions actually determined in earlier stages of the litigation by the court whose final adjudication is brought here for review."
> *Urie* v. *Thompson*, 93 Law Ed. Ad. Op. 927 at p. 935

To recognize any rule to the contrary would forever foreclose an appellant in this Court by virtue of the state court's silence on the federal question whether such silence is attributed to indifference, neglect or refusal to speak.

> *Brown* v. *Western Railway of Alabama*, 94 Law Ed. Ad. Op. p. 93 at p. 95
> "The fact that the state court purported to rest its decision largely on state law does not eliminate our duty to consider the question to the extent that it arises under federal law. . . . It is, of course, for us to examine whether questions of federal law were necessarily, although only impliedly, adjudicated by the state court."
> *Grand River Dam Authority* v. *Grand-Hydro*, 93 Law Ed. Ad. Op. p. 81 at p. 86

In conclusion, it is respectfully submitted to this Court that appellees in no manner sought to distinguish the authorities cited by the appellants sustaining the statement as to jurisdiction, and that such authorities by themselves are sufficient to give this Court jurisdiction. It was sincerely hoped by appellants that the appellees would in some manner seek to distinguish the doctrine as established by this Court in the case of *Angel* v. *Bullington*, where this Court so specifically held that appellants in the situation as

exists in the case at bar could appeal to this Court not by grace of the Court but as and by virtue of an absolute right under the federal laws.

Respectfully submitted,

WILMOT W. GARVIN,
605 Columbia Building,
Spokane, 8, Washington

THOMAS I. OAKSHOTT,
Collins Building,
Colville, Washington

JOHN F. GARVIN,
503 Lyon Building,
607 Third Avenue,
Seattle, 4, Washington

CLAUDE L. DAWSON,
917 - 15th St., N. W.,
Washington, 5, D. C.
Attorneys for the Appellants.

POOR COPY

BLEED THROUGH

FILE COPY

FILED
FEB 15 1950
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 608

GERALD MILLER AND DAVID CAUDILL, ETC.,
Appellants,

vs.

CITY OF SPOKANE, A MUNICIPAL CORPORATION; WILLIAM P. PAYNE, COMMISSIONER OF PUBLIC SAFETY, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

G. M. FERRIS,
B. A. FARLEY,
PAUL F. SCHIFFNER,
CHARLES S. RHYNE,
Counsel for Appellees.

POOR COPY

BLEED THROUGH

INDEX

Subject Index

	Page
Statement opposing jurisdiction	1
Statement of facts	1
Grounds against jurisdiction	4
Affidavit of B. A. Farley	7
Motion to dismiss appeal or affirm	11

Table of Cases Cited

American Ry. Express Co. v. *Commonwealth of Kentucky*, 273 U. S. 269, 47 S. Ct. 353, 71 L. ed. 639	5
Charleston Federal Savings & Loan Ass'n. et al. v. *Alderson*, 324 U. S. 182, 65 S. Ct. 624	5
Christman v. *Miller*, 197 U. S. 313, 25 S. Ct. 468, 49 L. ed. 770	5
First National Bank of Garnett v. *Ayers*, 160 U. S. 660, 16 S. Ct. 412, 40 L. ed. 573	5
Gorman v. *Washington University*, 316 U. S. 98, 62 S. Ct. 962	5
Hiwaassee River Power Co. v. *Carolina-Tennessee Power Co.*, 252 U. S. 341, 64 L. ed. 601, 40 S. Ct. 330	5
Hulbert v. *Chicago*, 202 U. S. 275, 50 L. ed. 1026, 26 S. Ct. 617	5
Supreme Lodge, etc. v. *Meyer*, 265 U. S. 30, 44 S. Ct. 432, 68 L. ed. 885	5
Whitney v. *People of the State of California*, 274 U. S. 357, 71 L. ed. 1095, 47 S. Ct. 641	5

Statutes Cited

Constitution of the United States, 14th Amendment	6
Constitution of the State of Washington, Article XI, Section 100	3
Ordinance No. C10078 of the City of Spokane	2, 3
Remington's Revised Statutes, Section 2472	2, 3

POOR COPY

BLEED THROUGH

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 608

GERALD MILLER AND DAVID CAUDILL, FOR THEMSELVES AND FOR THE BENEFIT OF OTHERS SIMILARLY SITUATED,
Appellants,

vs.

CITY OF SPOKANE, A MUNICIPAL CORPORATION; WILLIAM P. PAYNE, COMMISSIONER OF PUBLIC SAFETY; E. W. PARSONS, CHIEF OF POLICE; WILLARD TAFT, KENNETH LAWSON, ARTHUR R. MEEHAN AND WALLACE N. SPROUL, CITY COMMISSIONERS, ALL PUBLIC OFFICIALS OF THE CITY OF SPOKANE, WASHINGTON,
Appellees

STATEMENT OPPOSING JURISDICTION

Come now the appellees herein and make and file the following statement opposing jurisdiction:

Statement of Facts

This action was brought by the appellants to enjoin the appellees, the City of Spokane, Washington, and certain of its officers, from prohibiting the operation, possession and maintenance of pinball machines within the city. Two questions were presented. First, are pinball machines as

described in the opinion of the Supreme Court of the State of Washington gambling devices prohibited by the laws of that state? And second, if so, is an ordinance of the City of Spokane, which would prohibit their operation, maintenance and possession, subject to referendum by the people?

On March 28, 1949, the City Council adopted Ordinance No. C10078, prohibiting the operation, possession and maintenance of pinball machines. Section 1 of that ordinance is as follows:

> "Section 1. Any person, firm or corporation who shall have in his or its possession or who shall conduct, maintain, operate or use, either as owner or owners, proprietor or proprietors, lessee or lessees, employee or employees, agent or agents, any pinball machine or any other automatic or mechanical device of like character, other than slot machines in private clubs as provided by Ordinance No. C10077, wherein there enters an element of chance, whether the same be played or operated for money, checks, credits or any other thing or representative of value, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine in any sum not exceeding Three Hundred Dollars ($300) or by imprisonment in the city jail for a period not exceeding ninety (90) days, or by both such fine and imprisonment."

This ordinance is in conformity with Remington's Revised Statutes of the State of Washington, Section 2472, which reads as follows:

> "Possession of gambling devices. Every person who shall have in his possession or shall permit to be placed or kept in any building or boat, or part thereof, owned, leased or occupied by him, any table, slot machine, or any other article, device or apparatus of a kind commonly used for gambling, or operated for the losing or winning of any money or property, or any representative of either, upon any chance or uncertain or contingent event, shall be guilty of a gross misdemeanor."

POOR COPY

BLEED THROUGH

Prior to the effective date of Ordinance No. C10078, a petition satisfying the requirements of the referendum provisions of the Charter of the City of Spokane was filed with the City Council protesting the enactment of the ordinance. Thereafter the City Council reconsidered the ordinance as required by the Charter, and directed that it be submitted to popular vote at the next municipal election, *if such action became necessary.* At the same time, upon motion duly made, the Council ordered that

> "All persons operating or having in their possession pinball machines contrary to Remington's Revised Statute 2472 and the provisions of Section 22 of Ordinance No. C1377 of the City of Spokane be hereby notified that arrests for such violations will commence on the 23rd day of May, 1949."

Before said order was to become effective, this action was commenced to restrain enforcement of the order, and a temporary injunction was issued.

The Superior Court did not pass upon the question as to the legality of the operation of the machines, but held that, whether the machines were or were not gambling devices, the ordinance prohibiting their use was subject to referendum, and continued the injunction in force until such time as the matter could be submitted to the people for popular vote at a municipal election.

Upon appeal to the Supreme Court of the State of Washington, the judgment of the Superior Court was reversed. The Supreme Court held that the machines were gambling devices prohibited by Section 2472, Remington's Revised Statutes *supra*, which was in force and effect, and as such could not be legalized by either the city commissioners of the City of Spokane, or the people of that city acting in a legislative capacity, in view of Article XI, Section 10, of

the Constitution of the State of Washington, providing in part as follows:

> ". . . cities or towns heretofore or hereafter organized and all charters thereof framed or adopted by authority of this Constitution shall be subject to and controlled by general laws."

The action was thereafter dismissed by direction of the Supreme Court.

Grounds Against Jurisdiction

1. The appellants have failed to comply with paragraph 2 of Rule 12 of this Court, which provides that appellants shall serve upon appellees "within 5 days after such allowance (a) a copy of the petition for the order allowing the appeal, together with a copy of the assignments of error and of the statement required by paragraph 1 of this rule, and (b) a statement directing attention to the provisions of paragraph 3 of this rule." The record shows that the appeal was allowed on January 7th, 1950, and the above mentioned papers were not served upon appellees until January 18, 1950, or 6 days late.

2. There is no Federal question involved.

3. The judgment of the Supreme Court of the State of Washington did not draw in question the validity of any state statute on the ground of its being repugnant to the Constitution of the United States.

4. The real question involved is one of fact and not of law, namely, is a pinball machine as described in the opinion of the Supreme Court of the State of Washington a gambling device. The Supreme Court of Washington held that a pinball machine is a gambling device. Its decision is not reviewable in this Court.

POOR COPY

BLEED THROUGH

5. The appellants have failed to show by their "Statement as to Jurisdiction" wherein any Federal question was raised, discussed or argued in their brief, filed in the Supreme Court of the State of Washington, as required by Rule 12 of this Court.

6. The record fails to show that the Supreme Court of the State of Washington passed on any Federal question in this case.

7. This appeal is taken for delay only.

8. The questions on which the decision of this case depends are so unsubstantial as not to need further argument.

In support of the foregoing objections, we cite the following authorities:

Hiawassee River Power Co. v. *Carolina-Tennessee Power Co.*, 252 U. S. 341, 64 L. Ed. 601, 40 S. Ct. 330;

Hulbert v. *Chicago*, 202 U. S. 275, 50 L. Ed. 1026, 26 S. Ct. 617;

Whitney v. *People of State of California*, 274 U. S. 357, 71 L. Ed. 1095, 47 S. Ct. 641;

Charleston Federal Savings & Loan Ass'n et al. v. *Alderson*, 324 U. S. 182, 65 S. Ct. 624;

Gorman v. *Washington University*, 316 U. S. 98, 62 S. Ct. 962;

Christman v. *Miller*, 197 U. S. 313, 25 S. Ct. 468, 49 L. Ed. 770;

American Ry. Express Co. v. *Commonwealth of Kentucky*, 273 U. S. 269, 47 S. Ct. 353, 71 L. Ed. 639;

Supreme Lodge etc. v. *Meyer*, 265 U. S. 30, 44 S. Ct. 432, 68 L. Ed. 885;

First National Bank of Garnett v. *Ayers*, 160 U. S. 660, 16 S. Ct. 412, 40 L. Ed. 573.

Any question under the Fourteenth Amendment is foreclosed by previous decisions of this Court as cited above and is so unsubstantial and frivolous as to justify the motion to affirm or dismiss filed herein.

Respectfully submitted,

G. M. FERRIS,
City Hall, Spokane, Washington,
B. A. FARLEY,
City Hall, Spokane, Washington,
PAUL F. SCHIFFNER,
City Hall, Spokane, Washington,
CHARLES S. RHYNE,
730 Jackson Place, N. W.,
Washington, D. C.,
Counsel for Appellees.

Service of the foregoing Statement Opposing Jurisdiction, by receipt of copy thereof, is hereby acknowledged this 26 day of January, 1950.

WILMOT W. GARVIN,
One of Attorneys for Appellants.

BLEED THROUGH POOR COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 608

GERALD MILLER AND DAVID CAUDILL, FOR THEMSELVES AND FOR THE BENEFIT OF OTHERS SIMILARLY SITUATED, *Appellants,*

vs.

CITY OF SPOKANE, A MUNICIPAL CORPORATION; WILLIAM P. PAYNE, COMMISSIONER OF PUBLIC SAFETY; E. W. PARSONS, CHIEF OF POLICE; WILLARD TAFT, KENNETH LAWSON, ARTHUR R. MEEHAN AND WALLACE N. SPROUL, CITY COMMISSIONERS, ALL PUBLIC OFFICIALS OF THE CITY OF SPOKANE, WASHINGTON, *Appellees*

AFFIDAVIT

STATE OF WASHINGTON,
County of Spokane, ss.:

B. A. Farley, being first duly sworn, upon oath deposes and says: That he is one of the attorneys for the appellees in the above entitled action; that on January 9, 1950, Wilmot W. Garvin, one of the attorneys for the appellants submitted to affiant for consideration the following stipulation:

"It is stipulated between the parties, through their respective counsel, George M. Ferris, B. A. Farley and

Paul F. Schiffner, attorneys for the City of Spokane, and W. W. Garvin, of counsel for Gerald Miller and David Caudill, that the certified transcript of the record as evidenced by the contents of respondents' Praecipe be and is hereby accepted by the City of Spokane, and it is further stipulated that the record may be sent to the Clerk of the Supreme Court of the United States forthwith.

"Dated this 9th day of January, 1950.

"....

"....

"....

"Attorneys for Appellants.

"WILMOT W. GARVIN (Signed),

"One of Attorneys for Respondents."

and in connection therewith left with affiant copies of certain proceedings which the said Wilmot W. Garvin informed affiant would be included in the certified transcript of the record; that, in addition to the proposed stipulation and copies of said proceedings, the said Wilmot W. Garvin at the same time left with affiant the following note which was typewritten save and except the last line which was in the handwriting of the said Wilmot W. Garvin, namely:

"The following items are missing which will be in your certified copy:

"Petition for Appeal
"Assignments of Error
"Order Allowing Appeal and Fixing Bond
"Bond of $1000.00
"Statement of Jurisdiction".

That counsel for the appellees were unwilling to sign said stipulation and so advised the said Wilmot W. Garvin; that on the 18th day of January, 1950, said Wilmot W. Garvin served upon G. M. Ferris, one of the attorneys for the appellees, notice and statement as to jurisdiction; that on said

POOR COPY

BLEED THROUGH

date affiant informed the said Wilmot W. Garvin that he had failed to serve the petition for appeal, assignments of error and order allowing appeal and fixing bond, and immediately thereafter the said Wilmot W. Garvin served said papers upon affiant; that at said time the attention of the said Wilmot W. Garvin was called to the note concerning the items which were missing as herein set forth and that the said Wilmot W. Garvin stated to affiant that it would be difficult to overcome said note but that he would be forced to file an affidavit to the effect that it was his recollection that he had served said papers on January 9, 1950.

B. A. FARLEY.

Subscribed and sworn to before me this 26th day of January, 1950.

NORMAN S. JOHNSON,
Notary Public for the State of
[SEAL.] *Washington, residing at Spokane.*

Commission expires Apr. 23, 1951.

BLEED THROUGH

POOR COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 608

GERALD MILLER AND DAVID CAUDILL, FOR THEMSELVES AND FOR THE BENEFIT OF OTHERS SIMILARLY SITUATED, *Appellants,*

vs.

CITY OF SPOKANE, A MUNICIPAL CORPORATION; WILLIAM P. PAYNE, COMMISSIONER OF PUBLIC SAFETY; E. W. PARSONS, CHIEF OF POLICE; WILLARD TAFT, KENNETH LAWSON, ARTHUR R. MEEHAN AND WALLACE N. SPROUL, CITY COMMISSIONERS, ALL PUBLIC OFFICIALS OF THE CITY OF SPOKANE, WASHINGTON, *Appellees*

MOTION TO DISMISS APPEAL OR AFFIRM

Come now appellees herein and move this Court to dismiss with costs the appeal taken herein to this Court by appellants upon the following grounds:

1. The appellants have failed to comply with paragraph 2 of Rule 12 of this Court, which provides that appellants shall serve upon appellees "within 5 days after such allowance (a) a copy of the petition for the order allowing the appeal, together with a copy of the assignments of error and of the

statement required by paragraph 1 of this rule, and (b) a statement directing attention to the provisions of paragraph 3 of this rule." The record shows that the appeal was allowed on January 7th, 1950, and the above mentioned papers were not served upon appellees until January 18, 1950, or was 6 days late.

2. There is no Federal question involved.

3. The judgment of the Supreme Court of the State of Washington did not draw in question the validity of any state statute on the ground of its being repugnant to the Constitution of the United States.

4. The real question involved is one of fact and not of law, namely, is a pinball machine as described in the opinion of the Supreme Court of the State of Washington a gambling device. The Supreme Court of Washington held that a pinball machine is a gambling device. Its decision is not reviewable in this Court.

5. The appellants have failed to show by their "Statement as to Jurisdiction" wherein any Federal question was raised, discussed or argued in their brief, filed in the Supreme Court of the State of Washington, as required by Rule 12 of this Court.

6. The record fails to show that the Supreme Court of the State of Washington passed on any Federal question in this case.

7. This appeal is taken for delay only.

8. That the questions on which the decision of this case depends are so unsubstantial as not to need further argument.

In the alternative, appellees move this Court to affirm this cause on the ground that:

POOR COPY

BLEED THROUGH

1. The appellants have failed to comply with paragraph 2 of Rule 12 of this Court, which provides that appellants shall serve upon appellees "within 5 days after such allowance (a) a copy of the petition for the order allowing the appeal, together with a copy of the assignments of error and of the statement required by paragraph 1 of this rule, and (b) a statement directing attention to the provisions of paragraph 3 of this rule." The record shows that the appeal was allowed on January 7th, 1950, and the above mentioned papers were not served upon appellees until January 18, 1950, or was 6 days late.

2. There is no Federal question involved.

3. The judgment of the Supreme Court of the State of Washington did not draw in question the validity of any state statute on the ground of its being repugnant to the Constitution of the United States.

4. The real question involved is one of fact and not of law, namely, is a pinball machine as described in the opinion of the Supreme Court of the State of Washington a gambling device. The Supreme Court of Washington held that a pinball machine is a gambling device. Its decision is not reviewable in this Court.

5. The appellants have failed to show by their "Statement as to Jurisdiction" wherein any Federal question was raised, discussed or argued in their brief, filed in the Supreme Court of the State of Washington, as required by Rule 12 of this Court.

6. The record fails to show that the Supreme Court of the State of Washington passed on any Federal question in this case.

7. This appeal is taken for delay only.

8. The questions on which the decision of this case depends are so unsubstantial as not to need further argument.

Dated this 26th day of January, 1950.

G. M. FERRIS,
City Hall, Spokane, Washington,
B. A. FARLEY,
City Hall, Spokane, Washington,
PAUL F. SCHIFFNER,
City Hall, Spokane, Washington,
CHARLES S. RHYNE,
730 Jackson Place, N. W.,
Washington, D. C.,
Counsel for Appellees.

POOR COPY

No. 608. MILLER ET AL. *v.* SPOKANE ET AL. Appeal from the Supreme Court of Washington. *Per Curiam:* The motion to dismiss is granted and the appeal is dis-

missed for want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. *Claude L. Dawson* for appellants. *Charles S. Rhyne* for appellees. Reported below: 35 Wash. 2d 111, 211 P. 2d 165.